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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR, PETITIONER,

vs.

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION, REGIONAL OFFICE No. 3021, NEW ORLEANS, LOUISIANA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 1, 1951

CERTIORARI GRANTED NOVEMBER 26, 1951

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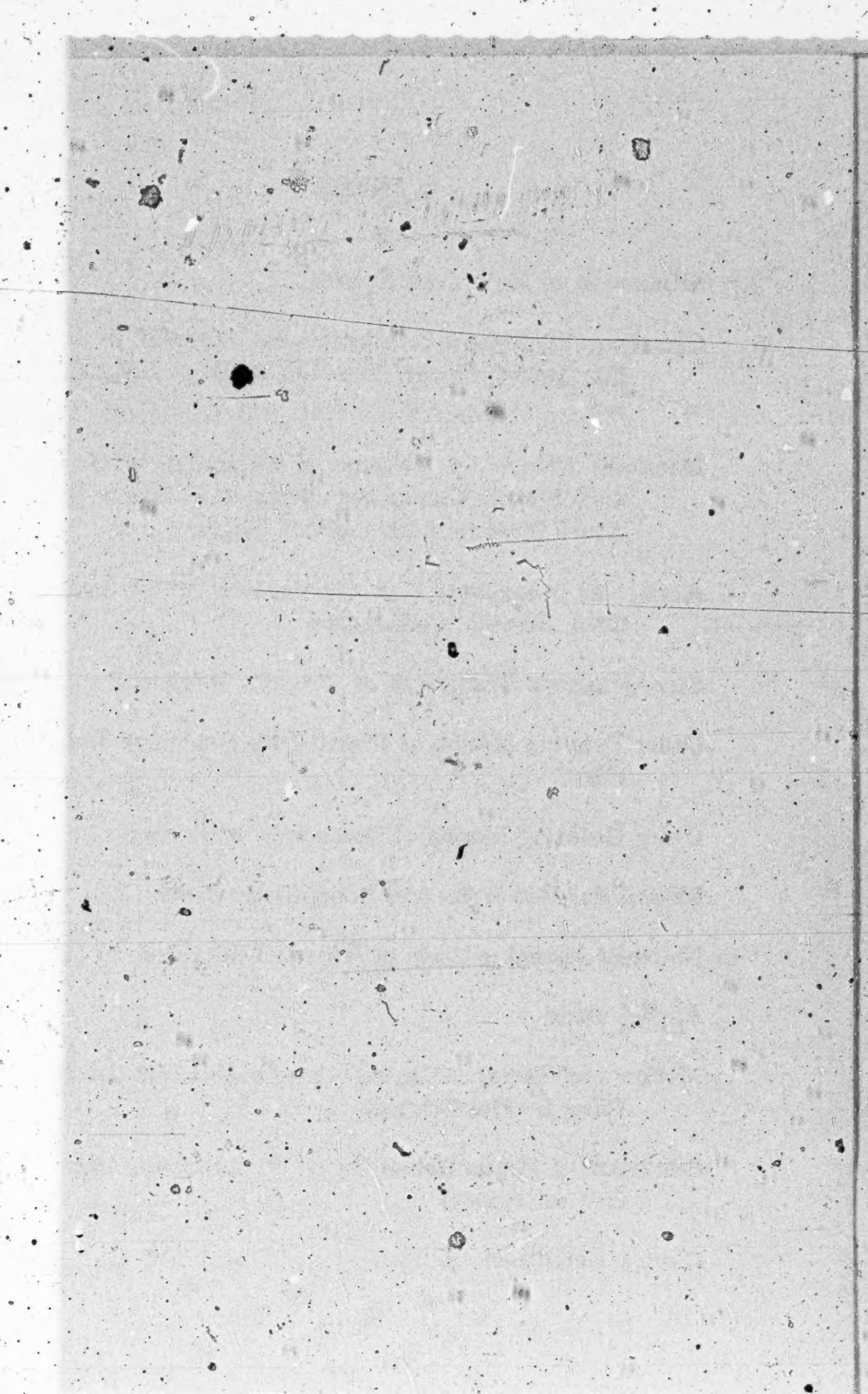

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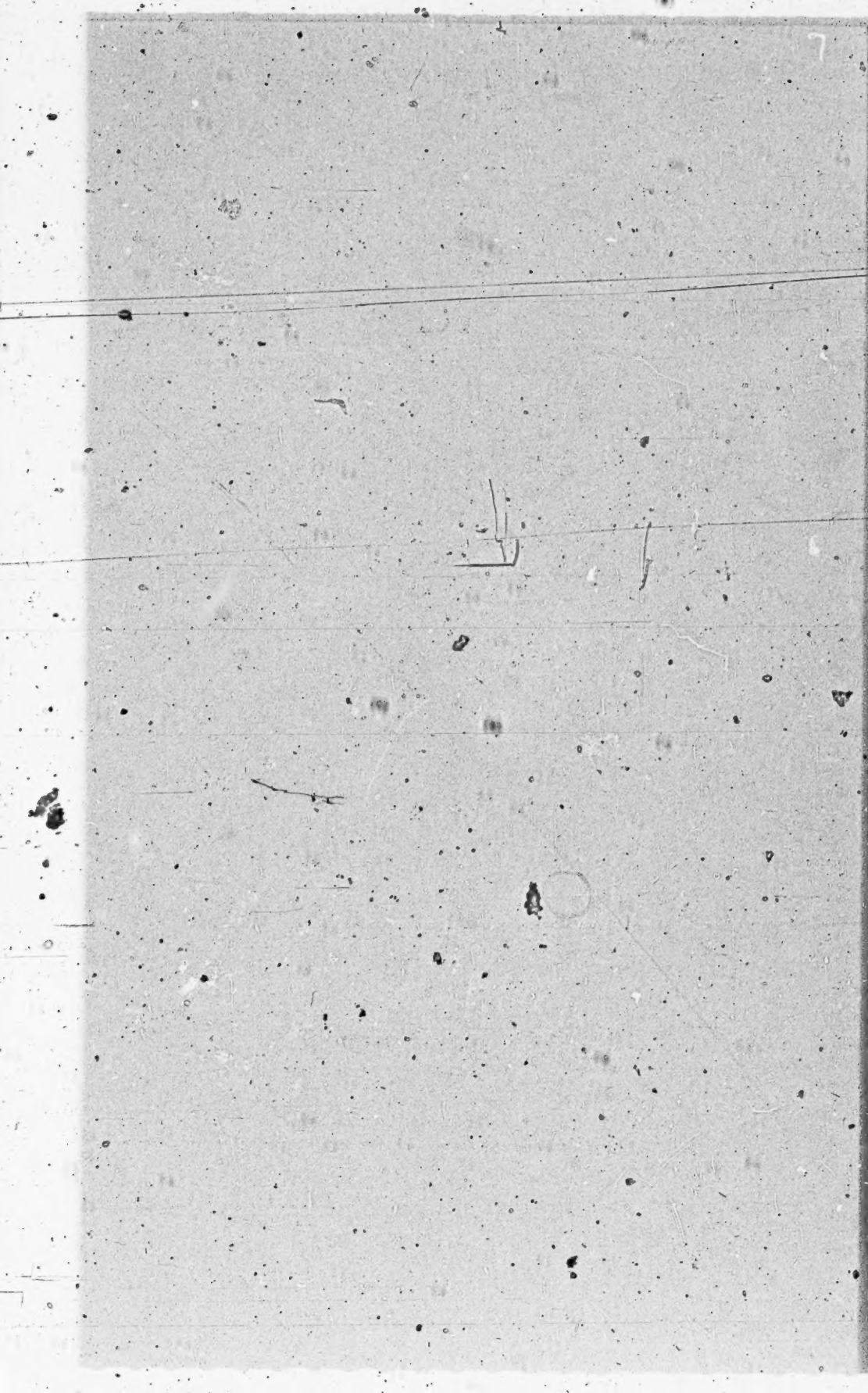

UNITED STATES OF AMERICA,
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.

No. 2095 Civil Action

ARMAND EDWARD BLACKMAR

versus

L. F. GUERRE, Manager, Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, and UNITED STATES CIVIL SERVICE COMMISSION

Appearances:

Rene R. Nicaud, Esq., Attorney for Appellant.

N. E. Simoneaux, Esq., Assistant United States Attorney Attorney for Appellees.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 16th day of November, 1950, at the City of New Orleans, Louisiana.

EXTENSION of time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including February 14, 1951.

1

STIPULATION OF RECORD ON APPEAL

Filed: January 15, 1951.

(Number and Title Omitted)

It is stipulated by RENE R. NICAUD, counsel for plaintiff, Armand Edward Blackmar, and John N. McKay, United States Attorney for the Eastern District of Louisiana, counsel for defendants, L. F. Guerre, manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and United States Civil Service Commission, that the record on appeal in this case shall consist of the following:

1. The complaint filed by the plaintiff on March 31, 1948, excluding all exhibits attached thereto.

2. The return of the United States Marshall and service on the United States Civil Service Commission through A. J. Leach, Regional Director, Tenth United States Civil Service Region on April 2, 1948.

3. The fact that the returns of the United States Marshall show further service of the summons and complaint as follows:

Date of Service	Persons Served
April 1, 1948	Robert Weinstein, United States Attorney for the Eastern District of Louisiana, Room 237, P. O. Bldg., New Orleans, Louisiana.

April 2, 1948 — L. F. Guerre, Manager, Veterans Administration Regional Office, Masonic Temple, New Orleans, La.

April 1, 1948 — Mailing of copy of summons and of complaint by Registered Mail to Attorney General of the United States at Washington, District of Columbia, and return receipt thereon dated April 5, 1948.

April 2, 1948 — Mailing of copy of summons and of complaint to the United States Civil Service Commission, by Registered Mail, Washington, District of Columbia, and return receipt thereon dated April 5, 1948.

4. The fact that on June 1, 1948, the defendants filed a motion to dismiss for want of jurisdiction and lack of venue; that this motion was argued and submitted on May 25, 1949; that in plaintiff's brief and in the argument, the Court's attention was called to the fact that under 28 U.S.C.A. 1404, venue was no longer a grounds for dismissal; that this motion to dismiss was denied by the District Court by order rendered and entered June 13, 1949.

5. The answer filed on behalf of defendants on August 2, 1949.

6. The fact that on August 15, 1949, by order of the District Court of August 11, 1949, the record of the

administrative proceedings was filed in these proceedings.

7. The fact that on May 4, 1950, a motion for summary judgment was filed on behalf of the plaintiff; that said motion was argued and submitted on June 7, 1950; that on June 6, 1950, the defendants' filed a counter-motion for a summary judgment, together with a motion to dismiss in which they reurged their objection to the jurisdiction and venue of the District Court for the Eastern District of Louisiana.

8. Comments of the Honorable Herbert W. Christenberry, Judge of the District Court on July 12, 1950, after the conclusion of the argument and submission of the defendants' motion for summary judgment and motion to dismiss.

9. Orders of the District Court rendered October 16, 1950, and entered October 18, 1950, denying plaintiff's motion for summary judgment, sustaining defendant's motion to dismiss and accordingly, dismissing plaintiff's suit.

10. Motion for new trial and relief from order filed by plaintiff on October 27, 1950.

11. The fact that the District Court by order rendered November 8, 1950, and entered November 13, 1950, denied plaintiff's motion for new trial and relief from order.

12. Notice of appeal filed by plaintiff November 16, 1950.

13. Appeal bond.

14. It is further stipulated that the record of administrative proceedings be transmitted to the appellate court in the original as per order of this Court, dated December 19, 1950.

15. The said order dated December 19, 1950.

16. The fact that by order dated December 19, 1950, the time within which the record could be filed with the appellate court therein docketed was extended to within 50 days from December 26, 1950.

New Orleans, Louisiana, January 12, 1951.

(Signed) RENE R. NICAUD
Attorney for Plaintiff, 501 Marine Building, New Orleans, Louisiana

(Signed) N. E. SIMONEAUX
Assistant United States Attorney, Room 237, P. O. Bldg, New Orleans, La.

COMPLAINT TO REVIEW ADMINISTRATION PROCEEDINGS AND FOR RELIEF UNDER THE DECLARATORY JUDGMENT ACT

Filed: March 31, 1948.

(Number and Title Omitted)

1.

The plaintiff, ARMAND EDWARD BLACKMAR, is a resident of the Parish of Orleans, State of Louisiana. He is an honorably discharged veteran of the armed forces of the United States who had served on active duty in World War I, and at the time of his wrongful suspension and dismissal hereinafter set forth, had completed a probationary or trial period employed in the Civil Service in the Veterans Administration, Regional Office, No. 3021, P & S Classification No. 4 at a basic salary of $5,152.80 per annum.

2.

The defendant, L. F. Guerre, is the duly appointed and qualified manager of the Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, an agency of the United States; that he is an officer of the United States in charge of the said Regional Office of the Veterans Administration and is a resident of the Parish of Orleans, State of Louisiana.

3.

The defendant, the United States Civil Service Commission is an agency of the United States Government and is represented in this jurisdiction by A. J. Leach, the duly

qualified and appointed Regional Director, of the Tenth United States Civil Service Region, who is a resident of the Parish of Orleans, State of Louisiana.

4.

This is a suit of a Civil nature, arising under the Constitution and the laws of the United States, relating to an Act of Congress, the Veterans' Preference Act of 1944, (5 U. S. C. 851-869). It presents and involves an actual controversy between plaintiff and defendant, L. F. Guerre, in his aforesaid capactiy, and the validity and effect of certain proceedings of the United States Civil Service Commission and the matter in controversy exclusive of interest and cost exceeds $3,000.00 and is brought under the general jurisdiction of this Court, (28 U.S.C. 41 (1)), and under the Administrative Procedure Act, (5 U.S.C. 1001-1011), to review, set aside, and annul the hereinafter described action of defendant, L. F. Guerre, in his capacity as Manager of the Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, and the hereinafter described and complained of action of the United States Civil Service Commission, and for declaratory relief under the Federal Declaratory Judgment Act (28 U.S.C. 400).

Plaintiff has no other adequate remedy in any Court and has exhausted all of his Administrative remedies.

5.

The wrongful administrative acts of which plaintiff complains, and by which he has been aggrieved are his suspension without pay from his said position with the Veterans Administration on January 2, 1947. by the purported notifi-

cation of that date annexed hereto, marked Exhibit "A" and made part hereof, and his discharge from said position, effective March 2, 1947 by the action of the defendant, L. F. Guerre, in his aforesaid capacity, and the action of the United States Civil Service Commission in granting to the Veterans' Administration an appeal from the unanimous decision of the Tenth United States Civil Service Region of May 5, 1947 and reversing the said decision of the Tenth Civil Service Region which found plaintiff's dismissal unwarranted and recommended his reinstatement.

A summary of the facts and administrative proceedings up to, but exclusive of, the final hearing before the United States Civil Service Commission is set forth on pages 1 to 8 of plaintiff's brief before the said Commission which brief is hereto annexed, marked Exhibit "B" and made part hereof; that as plaintiff could not afford the expense of an additional trip to Washington D. C., the matter was submitted on December 9, 1947, to the full Commission on the annexed brief. At this hearing, the Veterans Administration was given 15 days to file its reply brief and it was not until February 3, 1948, that plaintiff was furnished a copy of the Veterans Administration brief which had been filed with the Commission, January 12, 1948. On February 16, 1948, plaintiff received a letter from the Commission dated February 11, 1948, advising him that:

> "The decision of the Commission under date of August 15, 1947, reversing the finding of the Tenth Civil Service Region and approving the action of the Veterans Administration in removing Mr. Blackmar has been affirmed."

6.

The action of defendant, L. F. Guerre, in his aforesaid

capacity, in suspending and discharging plaintiff from his said position was unwarranted, arbitrary, illegal, null, and void for the reasons that:

(1) The notice of proposed action dated January 2, 1947, and the notice of adverse action dated February 14, 1947, of the defendant, L. F. Guerre, in his aforesaid capacity, did not state the reasons in writing for his suspension and discharge specifically and in detail as required by Section 14 of the Veterans' Preference Act of 1944 and the regulations of the Civil Service Commission pursuant thereto.

(2) The charges averred were not such cause as would promote the efficiency of the service and could not constitute a lawful basis for the dismissal of a veteran under Section 14 of the Veterans' Preference Act of 1944, the regulations of the Civil Service Commission pursuant thereto, and the rules of the Veterans Administration.

(3) Plaintiff was never afforded a fair and adequate hearing by the Veterans Administration.

(4) The said action was contrary to the law and the evidence, and there was no substantial evidence to support the alleged charges.

And as will more fully appear from the said annexed Exhibit "B", made part hereof, and to the extent not contrary to the foregoing, as will appear from the duplicate original of the said unanimous decision of the Tenth United States Civil Service Region approved May 5, 1947, annexed

hereto, marked Exhibit "C", and made a part hereof, which found the action of the defendant unwarranted and ordered the reinstatement of plaintiff to his aforesaid position.

7.

That the subsequent action of the United States Civil Service Commission in granting the Veterans Administration an appeal and in reversing the decision of the Tenth United States Civil Service Region was unwarranted, arbitrary, illegal, null and void for the following reasons, to-wit:

(1) In granting an appeal to the Veterans Administration from the decision of the Tenth Civil Service Region, the Civil Service Commission exceeded its authority as no such appeal is provided or authorized by law; that the regulations of the United States Civil Service Commission purporting to authorize such an appeal are illegal and void for they are neither reasonable nor are they in harmony with the purpose of the Veterans' Preference Act of 1944. In granting such an appeal, over the objections of plaintiff's counsel, the Commission subjected the defendant to a trial at Washington, D. C., 1200 miles from his venue, where his witnesses were unavailable, considered charges and ex parte evidence which had been excluded in the Regional hearing and thereby deprived plaintiff of the right of cross examination and rebuttal, all in violation of the laws of the United States (Section 14 of the Veterans' Preference Act of 1944; Section 7 (C) Administrative Procedure Act and other laws) and the regulations of the Civil Service Commission, (12 F. R. 207, Section 22.9).

(2) Based on the record as examined by plaintiff's Attorney, prior to the final Hearing before the United States Civil Service Commission, it is averred that the appeal by the veterans Administration was not filed within seven (7) days from the date of receipt of the decision of the Tenth United States Civil Service Region as required by the regulations of the United States Civil Service Commission.

(3.) In considering charges and evidence in support thereof, and approving adverse action, as to which the plaintiff had not been notified in writing of any and all reasons specifically and in detail, as required by the express provisions of Section 14 of the Veterans' Preference Act of 1944, and the regulations of the Civil Service Commission pursuant thereto.

(4) In considering the Third Charge, which was based on statements made by plaintiff in an Efficiency Rating Appeal under the honest belief that they were a proper part thereof, and which charge violated the rule of the Veterans Administration that the exercise of the right to an Efficiency Rating Appeal cannot be the cause of action prejudicial to an employee. These statements were made by plaintiff as an officer of a Governmental Agency to the officers of the same Governmental Agency in an official request for an investigation of conditions which appeared to him to justify an investigation for the good of the Government, and therefore, could not properly be the basis of plaintiff's dismissal under the Veterans' Preference Act of 1944. If this charge can properly be considered the basic of the discharge of a Veteran then it is averred, in the alternative, that

there was no investigation or Hearing thereof as required by Section 14 of the Veterans' Preference Act of 1944 or the regulations pursuant thereto and that there is no evidence in the record to substantiate it.

(5) In considering internal rules and regulations of the United States Civil Service Commission, not available to the general public and to plaintiff, in making its decision which practice violates the laws of the United States (Section 3 & 4, Administrative Procedure Act, Federal Register Act 44 U.S.C. 301-314 and other laws).

(6) In disregarding the established principle of Appellate law that the finding of a lower tribunal on questions of fact should not be reversed unless manifestly erroneous.

(7) The Hearing granted the Veterans Administration on August 15, 1947, at Washington D. C. on its appeal from the decision of the Tenth Civil Service Region was held before the Civil Service Commission's Board of Appeal and Review, composed of three members. It is averred on information and belief that each of said members made individual findings and recommendations to the Civil Service Commission; that plaintiff and his Attorney were refused the right to examine the findings and recommendation of the said Board of Appeals and Review and such analysis as the Commission may have made thereof; and therefore plaintiff had no way of knowing what in fact was the decision of the said Board, what evidence it considered, its evaluation thereof, and in what respect the decision of the

Regional Board was considered erroneous. Thus plaintiff and his counsel were effectively deprived of the right of knowing and requiring that his case be decided on appeal by those who heard it and of the opportunity to analyze the findings of his Judges on appeal so as to determine and point out for further review what errors may have been committed by them; that likewise no findings of the Commission or reasons for its reversal of the Regional decision, were ever given, or made available to plaintiff or his Attorney. That the said refusal of the Commission and its failure to furnish to plaintiff, findings and reasons for its decision, constitutes a violation of the laws of the United States (Section 14 of the Veterans' Preference Act of 1944; Section 3 (b) and 8 (b) of the Administrative Procedure Act and other laws) and of the United States Civil Service Regulations.

(8) In deciding the case contrary to the law and the evidence and without any substantial evidence to support its decision.

And as more fully urged before the United States Civil Service Commission, in Exhibit "B" annexed hereto and made a part hereof.

8.

For the reasons set forth in Articles Six and Seven hereof, plaintiff was denied a fair hearing and due process of law in the procedure of the said administrative agencies and the effect of the resulting administrative determinations, recommendations and orders is to deprive the plaintiff of his

property without due process of law in violation of the Fifth amendment of the Constitution of the United States.

9.

Since the said unlawful suspension and discharge of plaintiff, he has at all times been ready, willing and able to discharge the duties of the said position.

Under the provisions of Section 14 of the Veterans' Preference Act of 1944, as amended, as corrective action for said wrongful suspension and discharge, plaintiff is entitled to an order from the United States Civil Service Commission directing defendant, L. F. Guerre, in his aforesaid capacity, to reinstate plaintiff to the said position with the Veterans' Administration from which he was wrongfully suspended and discharged and providing that he be restored the pay for the said position from January 2, 1947, the date of his wrongful suspension, to the date of the payment thereof.

10.

The record of the aforesaid administrative proceedings is in this Jurisdiction in the possession, custody and control of A. J. Leach, in his capacity as Regional Director of the Tenth United States Civil Service Region.

Wherefore, Plaintiff Prays:

(1) That the United States Civil Service Commission through A. J. Leach, Regional Director of the Tenth United States Civil Service Region be served with a

copy of this complaint and that it certify and file in this Court, with its answer, the entire record in the aforementioned administrative proceedings.

(2) That this Court review the said administrative proceedings and that after due proceedings had, it grant plaintiff a Judgment or Decree:

(a) Setting aside and annulling, for the reasons hereinabove stated, the said action of defendant, L. F. Guerre, in his aforesaid capacity, in suspending and discharging plaintiff from his aforesaid position with the Veterans Administration, and setting aside and annulling, for the reasons hereinabove stated, the said action of the United States Civil Service Commission in granting the Veterans Administration an appeal from, and in reversing, the decision of the Tenth United States Civil Service Region which found plaintiff's discharge unwarranted and recommended his reinstatement.

(b) Declaring plaintiff's rights as respects to the aforesaid administrative proceedings, and declaring particularly that plaintiff is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position from January 2, 1947 to the date of the payment thereof, the exact amount of which to be determined in appropriate proceedings before the United States Civil Service Commission.

(3) That the plaintiff be granted such other, further and different relief as may be just and equitable in the premises.

(Signed) RENE R. NICAUD
Attorney for Plaintiff
327 Balter Bldg.
New Orleans, La.

MARSHAL'S RETURN ON REVERSE OF SUMMONS.

Filed: April 6, 1948.

(Number and Title Omitted)

Received on the 2nd day of April, and on the 2 day of April, 1948, at 4:40 o'clock P.M., I served a copy of the within Summons and Complaint, on the within named U. S. Civil Service Commission thru A. J. Leach Regional Director 10th U. S. C. S. Region, by leaving same in the hands of William Wallace McDougall, Deputy Regional Director, 10th U.S. C. S. Region at Federal Bldg. N. O., La.

(Signed) H. C. RICHARDSON
United States Marshal

By: (Signed) RUTH B. PICARD
Deputy

ANSWER OF DEFENDANTS L. F. GUERRE AND UNITED STATES CIVIL SERVICE COMMISSION.

Filed: August 2, 1949.

(Number and Title Omitted)

Now into Court, through undersigned counsel, come L. F. Guerre, Manager, Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, and United States Civil Service Commission, defendants herein, with full reservation of their rights under the exceptions to this Honorable Court's jurisdiction and venue herein and without in any manner abandoning same, for answer to plaintiff's complaint, shows:

1.

Article one is admitted.

2.

Article two is admitted.

3.

In answer to article three defendants admit that A. J. Leach is Regional Director, Tenth United States Civil Service Region, and a resident of the Parish of Orleans, State of Louisiana, but deny that A. J. Leach represents the United States Civil Service Commission for the purpose

of service of process in order to bring said Commission or any of its members within the jurisdiction of this Honorable Court.

4.

Answering article four of plaintiff's complaint defendants admit that this is a suit of a civil nature relating to the Veterans Preference Act of 1944 (T. 5 U.S.C. Sections 761-869) and that it involves the validity and effect of certain proceedings of the United States Civil Service Commission, and that the matter in controversy, exclusive of interest and costs, exceeds $3,000.00. Defendants admit that plaintiff has exhausted all of his administrative remedies, but deny all other allegations of fact and conclusions of law in plaintiff's said article.

5.

Defendants admit the allegations of article five of plaintiff's complaint except that they deny having performed any wrongful Administrative acts in this case.

6.

Defendants deny the allegations of article six except that it is admitted that the Tenth Civil Service Region rendered a decision on May 5, 1947, ordering the reinstatement of plaintiff as an employee of the Veterans Administration.

7.

Article seven is denied.

8.

Article eight is denied.

9.

Article nine is denied.

10.

Article ten is denied. The entire Civil Service record in this case, however, has been transmitted to the office of the United States Attorney for the Eastern District of Louisiana by the United States Civil Service Commission and will be filed in this case upon proper motion being submitted to this Honorable Court and order issued to that effect.

11.

Further answering plaintiff's complaint, defendants reassert the following defenses to this action:

(a) This Honorable Court's lack of jurisdiction over the Civil Service Commissioners who are inhabitants of the District of Columbia.

(b) The Court's lack of jurisdiction over the Administrator of Veterans' Affairs who is also an inhabitant of the District of Columbia.

(c) The Court's lack of jurisdiction of this action under the provisions of Section 10 of the Administrative Procedures Act, Title 5, U.S.C. Section 1009 (2), whereby actions falling solely within Agency discretion and for which adequate Administrative review is provided are excluded from the operation of said Section 10.

(d) The Court's lack of jurisdiction over this action in that it is an original action for a writ of mandamus.

(e) Plaintiff's inability to state a claim upon which this Honorable Court can grant any relief inasmuch as the action by which he was discharged was authorized by law and in conformity with applicable Civil Service Commission rules and regulations.

12/

Defendants further aver that the record of proceedings before the Civil Service Commission in this case will indicate that the proceedings were regular in every respect and that plaintiff's separation from service as an employee of the Veterans Administration was fully justified.

(Signed) J. SKELLY WRIGHT,
(J. Skelly Wright),
United States Attorney

(Signed) N. E. SIMONEAUX,
(N. E. Simoneaux),
Assistant United States Attorney, Room 237 Postoffice Bldg., New Orleans, La.

STENOGRAPHER'S TRANSCRIPT OF "COURT'S REMARKS"

Filed: August 17, 1950.

(Number and Title Omitted)

The Court:

Well, I will say what I said before about this case: It seems very clear to me that when the Chairman of the Board of Review, if he wrote this letter himself, or whoever wrote the letter, said, "The Commissioners, therefore, have approved recommendation that the decision of the Tenth Region be reversed and the recommendation that Mr. Blackmar be restored to the position from which he was removed is hereby withdrawn," he deliberately intended to convey the thought that the majority of the Board of Review had so decided and that the recommendation referred to was the recommendation of that Board, not of a minority member.

I think that was entirely unbecoming an official of the Federal Government. I know the District Attorney's office has no control over such cases, but the Attorney General has. When he represents Federal agencies he is acting as their attorney and is governed largely as every other attorney is and is not required to urge everything presented to him by some Governmental agency or bureau.

Pretermitting the question of whether venue is properly laid and what action will be taken on these motions, it is my view, from all that has been shown here, that common decency and honesty should prompt the responsible parties of

the Civil Service Commission to reinstate this plaintiff and not have the docket of this Court cluttered up with a case of this character: this Court or any other Court.

Now, you will have twenty days within which to file the brief as *Amicus Curiae*. The Court will dispose of this matter promptly when that is done.

Certified: A true and correct record of proceedings in said case, made by me at New Orleans, Louisiana the 12th day of July, 1950.

(Signed) WALTER H. HICKMAN
(Walter H. Hickman)
Official Court Reporter

ORDER DENYING MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT.

Minute Entry: October 16th, 1950, Christenberry, J:

(Number and Title Omitted)

This cause came on to be heard on June 7th, 1950 on the motion of plaintiff for summary judgment and was argued by counsel for the respective parties and submitted and the Court took time to consider;

Now therefore, after due consideration thereof;

It Is Ordered that the motion of plaintiff for summary judgment be, and the same is hereby, Denied.

(s) H.W.C.

ORDER GRANTING MOTION OF DEFENDANT TO DISMISS.

Minute Entry: October 16th, 1950, Christenberry, J:

(Number and Title Omitted)

This cause came on to be heard on July 12th, 1950 on the motion of defendants to dismiss or for summary judgment; and was argued by counsel for the respective parties and submitted and the Court took time to consider;

Now therefore, after due consideration thereof;

It Is Ordered By The Court that the motion of defendants to dismiss is granted on the following grounds:

1. This Court lacks jurisdiction over the persons of the United States Civil Service Commissioners because jurisdiction of this Court is not invoked on the ground of diversity of citizenship and said defendants are not residents or inhabitants of this district.

2. The United States Civil Service Commissioners are indispensible parties who have not been and cannot be subjected to the jurisdiction of this Court.

It Is Further Ordered that plaintiff's suit is accordingly, Dismissed.

(S.) H. W. C.

MOTION FOR NEW TRIAL AND RELIEF FROM ORDER

Filed October 27, 1950.

(Number and Title Omitted)

The plaintiff moves the Court as follows:

1. To set aside the order dismissing his complaint and for a new trial on the following grounds:

(a) That the Court erred in holding that it lacked jurisdiction over the persons of the United States Civil Service Commission.

(b) That the Court erred in holding that the United States Civil Service Commissioners are indispensable parties who have not been and cannot be subject to the jurisdiction of this Court.

(c) That the Court erred in implicitly holding that it did not have jurisdiction over the Civil Service Commission and that the Commission was not properly before it by the service effected on its Regional Director in this district, or that the Commission is an indispensable party.

(d) That the Court erred in disregarding the fact that this is a suit against the United States Civil Service Commission and L. F. Guerre, Manager, Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, in their official capacities as agents or agencies of the United States Government and that, therefore, this is a suit against the United States.

2. If the foregoing motion for a new trial is granted, plaintiff further moves the Court that he be granted leave to amend his petition so as to make the United States a party defendant "eo nominee".

3. In the alternative, plaintiff moves the Court that he be relieved under Rule 60 of the Federal Rule of Civil Procedure from the said order dismissing his complaint for the reason that because of mistake, inadvertent or excusable error, he failed to make the United States a party "eo nominee" and for leave to amend his petition to so make the United States a party defendant, "eo nominee".

(Signed) RENE R. NICAUD
(Rene R. Nicaud),
Attorney for Plaintiff, Armand Edward Blackmar, 501 Marine Bldg., New Orleans, Louisiana

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NOTICE OF MOTION

To: N. E. Simoneaux, Esq.
Assistant United States Attorney
Room 237 Post Office Building
New Orleans, Louisiana

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room .... United States Courts and Post Office Building, New Or-

leans, Louisiana, on the 8 day of November, 1950, at 10:00 o'clock A. M. or as soon thereafter as counsel can be heard.

(Signed) RENE R. NICAUD
(Rene R. Nicaud),
Attorney for Plaintiff, Armand Edward Blackmar, 501 Marine Bldg., New Orleans, Louisiana.

CERTIFICATE

I hereby certify that a copy of the above notice has been mailed or delivered to N. E. Simoneaux, Assistant United States Attorney, Room 237 Post Office Building, New Orleans, Louisiana, on this 27 day of Oct., 1950.

(Signed) RENE R. NICAUD
(Rene R. Nicaud),
Attorney for Plaintiff

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(B).

Filed: November 16, 1950.

(Number and Title Omitted)

Notice is hereby given that Armand Edward Blackmar, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order dismissing his complaint entered in this action on October 18, 1950.

(Signed) RENE R. NICAUD
(Rene R. Nicaud),
Attorney for Plaintiff, Armand Edward Blackmar, 501 Marine Bldg., New Orleans, Louisiana.

APPEAL BOND.

Filed; December 16, 1950.

(Number and Title Omitted)

Know All Men By These Presents, that I, Armand Edward Blackmar, as principal and Mrs. Felix O. Rousset and Edward M. Rowley, as surety, are held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars to the paid to the said United States of America, its attorneys, successors, or assigns to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 15 day of December, 1950.

Whereas on October 16, 1950, in an action in the District Court of the United States of the Eastern District of Louisiana, between Armand Edward Blackmar, plaintiff, and L. F. Guerre, Manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and United States Civil Service Commission, agencies of the United States of America, defendants, an order was rendered against the said Armand Edward Blackmar dismissing his suit and the said plaintiff has filed a notice of appeal from said order of dismissal.

Now, the condition of this obligation is that if the said Armand Edward Blackmar shall prosecute his appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation

to be void, otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this the day first above written.

Witnesses:

(S.) MARJORIE W. NICAUD

(S.) BOBBIE V. GOLDEN

(S.) ARMAND EDWARD BLACKMAR
Principal

(S.) MRS. FELIX O. ROUSSET

and

(S.) EDWARD M. ROWLEY
Surety

State of Louisiana
Parish of Orleans

AFFIDAVIT AND ACKNOWLEDGMENT OF SURETY

Mrs. Felix O. Rousset and Edward M. Rowley, who, after being duly sworn, say:

That they are each worth in excess of $250.00 over and above all of their debts and obligations in assets that can be subjected to levy under execution, and that they reside in the Parish of Orleans, and that they acknowledge that they executed the above and foregoing instrument as their own free act and deed.

(Signed) MRS. FELIX O. ROUSSET

(Signed) EDWARD M. ROWLEY

Sworn to and subscribed to before me on this the 15 day of December, 1950

(Seal) (Signed) RENE R. NICAUD

Notary Public

AFFIDAVIT OF PRINCIPAL

Armand Edward Blackmar, being duly sworn, says that he is informed and believes that Mrs. Felix O. Rousset and Edward M. Rowley the surety on this bond, each is worth over and above their debts and obligations in assets that can be subjected to levy under execution, the amount for which they have bound themselves in this bond, and does acknowledge that he executed the above and foregoing instrument as his own free act and deed.

(Signed) ARMAND EDWARD BLACKMAR

Sworn to and subscribed to before me on this the 15 day of December, 1950

(Seal) (Signed) RENE R. NICAUD
Notary Public

MOTION AND ORDER ALLOWING CERTAIN EXHIBITS TO BE FILED IN THE ORIGINAL

Filed: December 19, 1950.

(Number and Title Omitted)

On motion of Armand Edward Blackmar, plaintiff, appearing herein through Rene R. Nicaud, attorney, and suggesting to the Court that the record of the administrative proceedings in this case is extremely voluminous and the

cost of printing same would be prohibitive, and that it would be advisable that the said administrative record be before the Circuit Court of Appeals for reference purposes;

Plaintiff moves the Court for an order permitting him to file the original record of the administrative proceedings in the Circuit Court of Appeals as an exhibit without the necessity of having same printed and incorporated in the printed record of these proceedings.

And on further suggesting to the Court that counsel for defendants, the United States Attorney for the Eastern District of Louisiana, has no objection to the granting of the said order,

It Is Ordered By The Court that plaintiff be permitted to file the original record of the administrative proceedings in the Circuit Court of Appeals as an exhibit without the necessity of having same printed and incorporated in the printed record of these proceedings.

New Orleans, Louisiana, this 19th day of December, 1950.

(Signed) HEBERT W. CHRISTENBERRY
United States District Judge

(Signed) RENE R. NICAUD
Attorney for Plaintiff
501 Marine Bldg., New Orleans, La.

No Objection:

(Signed) N. E. SIMONEAUX
Assistant United States Attorney, Room 237, P. O. Bldg., New Orleans, La.

STATEMENT OF POINTS RELIED ON BY PLAINTIFF AND APPELLANT ON APPEAL.

Filed: January 15, 1951.

(Number and Title Omitted)

The plaintiff relies on the following points of error in the District Court's order dismissing his complaint:

1. That the Court erred in holding that it lacked jurisdiction over the persons of the United States Civil Service Commissioners.

2. That the Court erred in holding that the United States Civil Service Commissioners are indispensable parties who have not been and cannot be subject to the jurisdiction of this Court.

3. That the Court erred in implicitly holding that it did not have jurisdiction over the Civil Service Commission and that the Commission was not properly before it by the service effected on its Regional Director in this district, or that the Commission is an indispensable party.

4. That the Court erred in disregarding the fact that this is a suit against the United States Civil Service Commission and L. F. Guerre, Manager, Veterans Administration, Regional Office No. 3021, New Orleans, Louisiana, in their official capacities as agents or agencies of the United States Government and that, therefore, this is a suit against the United States.

5. That the Court erred in refusing to grant his motion for a new trial.

6. That the Court erred in refusing to relieve plaintiff under Rule 60 of Federal Rules of Procedure from the order dismissing his complaint.

7. That the Court erred in refusing to permit plaintiff to amend his petition so as to make the United States a party "eo nominee".

8. The Court erred in denying the plaintiff's motion for a summary judgment.

9. In the alternative, in the event the District Court was correct in its ruling that it did not have venue of this case, it erred in dismissing plaintiff's complaint since venue is no longer a grounds for dismissal, but in such event, the suit should have been transferred to the proper Court.

(Signed) RENE R. NICAUD
(Rene R. Nicaud),
Attorney for Plaintiff, Armand Edward Blackmar, 501 Marine Bldg., New Orleans, Louisiana

Service Accepted:

(Signed) N. E. SIMONEAUX
(N. E. Simoneaux),
Assistant United States Attorney, Room 237 Post Office Bldg., New Orleans, La.

CLERK'S CERTIFICATE

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 35 pages contain and form a full, true and complete transcript of the record, in the case entitled "Armand Edward Blackmar versus L. F. Guerre, et al.," No. 2095 of the Civil Action Docket of this Court as made up in accordance with the stipulation of record on appeal.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 5th day of February, A. D., 1951.

A. DALLAM OBRIEN, JR.,
Clerk.

(Seal)

By ANDREW J. BACON,
Deputy Clerk.

[fol. 37] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 23rd, 1951

No. 13540

ARMAND EDWARD BLACKMAR

versus

L. F. GUERRE, et al.

On this day *this day* this cause was called, and after argument by Rene R. Nicaud, Esq., for appellant and Lansing L. Mitchell, Esq., Assistant United States Attorney for Appellees, was submitted to the Court.

[fol. 38] OPINION OF THE COURT—Filed July 11, 1951

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13540

ARMAND EDWARD BLACKMER, Appellant,

versus

L. F. GUERRE, et al., Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

(July 11, 1951)

Before Hutcheson, Chief Judge, and Sibley and Strum, Circuit Judges.

STRUM, Circuit Judge:

Appellant sued in the Eastern District of Louisiana under the declaratory judgment act, 28 U. S. C. A. 2201, to secure a judgment declaring him entitled to reinstatement in his

former position with the Veteran's Administration in New Orleans, from which he was discharged by the regional [fol. 39] manager there, which action was affirmed by the U. S. Civil Service Commission. This appeal is from a judgment below dismissing the complaint for improper venue.

Defendants named in the complaint are: "L. F. Guerre, manager, Veteran's Administration regional office No. 3021, New Orleans, Louisiana, and United States Civil Service Commission."[1] Unless venue is properly laid in the Eastern district of Louisiana, and service of process can be effectuated there, both of which the Commission contests, the action must abate, as the Commission is clearly an indispensable party. To nullify the Commission's approval of appellant's dismissal by the Veteran's Administration is one of the principal objects of the complaint, which seeks mandatory relief against the Commission to correct its alleged error.

The complaint alleges that the Commission is represented in New Orleans by a regional director, upon whom process was served, and who resides in the Eastern district of Louisiana. But the suit is against the Commission itself, not the regional director. The complaint is silent as to the domicile of the Commission. The court takes judicial notice, however, that the Commission's official situs and legal domicile is in the District of Columbia, where its plenary powers [fol. 40] are exercised, though many of its subordinate and ministerial functions are necessarily carried out locally by regional officials who act, not by virtue of their own authority, but solely under the control and direction of the Commission. This fact, however, does not authorize suits against the Commission wherever its functions are thus vicariously performed.

Federal jurisdiction of this case is rested, not upon diver-

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[1] There was personal service of process on A. J. Leach, regional director, U. S. Civil Service Commission; upon L. F. Guerre, manager, Veteran's Administration regional office; and upon Robert Weinstein, United States Attorney, all at New Orleans. Copies of the summons and complaint were delivered by registered mail to the Attorney General of the United States, and to the U. S. Civil Service Commission, at Washington.

sity of citizenship, but upon the ground that it is a civil action arising under the Constitution and laws of the United States, the requisite jurisdictional amount being involved. 28 U. S. C. A. 1331(b). Appellant also asserts that sec. 10 of the Administrative Procedure Act, 5 U. S. C. A. 1009, confers jurisdiction.

The suit is *in personam*, as it involves only the personal rights or legal relations of the parties and their duty, or breach of duty, with respect thereto. Such a suit may be brought *only* in the judicial district where *all* defendants reside, "except as otherwise provided by law." 28 U. S. C. A. 1391(b). (Italics supplied). We have been directed to no other statute, and have found none, which provides "otherwise" for a suit of this nature. (Compare *Foster-Milburn Co. v. Knight*, 181 Fed. (2) 949; *Shapiro v. Bonanza Hotel Co.*, 185 Fed. (2) 777).

Since the domicile or legal residence of an executive agency of the United States, such as the Civil Service Commission, is ordinarily at the seat of government, suit must necessarily be brought in the District of Columbia under 28 U. S. C. A. 1331(b) where, as here, there is no statutory authority for instituting the suit elsewhere, and the Com- [fol. 41] mission is an indispensable party. *Bradley Lbr. Co. v. Nat'l. Labor Relations Brd.*, 84 Fed. (2) 97; *Podovinnikoff v. Miller*, 179 Fed. (2) 937; *Hartman v. Federal Res. Bank*, 55 Fed. Supp. 801; *Putnam v. Ickes* (CA-D.C.) 78 Fed. (2) 223; *Kentucky Natural Gas Corp. v. Public Serv. Comm., et al.*, 28 Fed. Supp. 509, headnotes 13 and 14, affirmed 119 Fed (2) 417.

The suit could not be transferred to the District of Columbia pursuant to 28 U. S. C. A. 1404(a) or 1406(a), because that would be an improper venue for the defendant L. F. Guerre, a resident of Louisiana. *Mississippi Power Co. v. Federal Power Comm.* (CA-5) 131 Fed. (2) 48. Transfer under those sections is limited to districts where the suit could be originally brought. *Putnam v. Ickes*, 78 Fed. (2) 223. Compare *Foster-Milburn Co. v. Knight*, 181 Fed. (2) 949; *Shapiro v. Bonanza Hotel Co.*, 185 Fed. (2) 777.

For the reasons stated, the judgment appealed from will be affirmed, but since we do not reach the merits the affirmance is without prejudice to further proceedings by appellant in the proper venue.

Affirmed.

[fol. 42] JUDGMENT

Extract from the Minutes of July 11, 1951

No. 13540

ARMAND EDWARD BLACKMAR

versus

L. F. GUERRE, et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed without prejudice to further proceedings by appellant in the proper venue.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 43] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 361

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
OCT 1 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 361

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, Manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RENE' R. NICAUD and
CONRAD MEYER III,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. _____

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, Manager, Veterans Administration Regional Office No. 3021, New Orleans, Louisiana, and UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Armand Edward Blackmar, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, issued on July 11, 1951 (R. 38) which affirms the decree of the District Court for the Eastern District of Louisi-

ana, New Orleans Division, dismissing petitioner's complaint on the ground of improper venue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in the transcript of record herein, pages 38 to 41. It has not yet been published in the reporters.

JURISDICTION

The decree of the Court of Appeals was entered on July 11, 1951, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The question presented is whether the Eastern District of Louisiana is the proper venue for this action and if it is not the proper venue, whether the District Court should not have transferred the action to the proper district instead of dismissing it.

STATEMENT

This is an action brought by a World War veteran to review the administrative proceedings which effected his discharge from his Civil Service position with the Veterans Administration at New Orleans and for a declaratory judgment of his rights under the Veterans Preference Act. The complaint shows that petitioner, a resident of New Orleans, Louisiana, was discharged by the defendant, Guerre, New Orleans Regional Manager of the Veterans Administration. From this action he appealed under Section 14 of the Veterans Preference Act to the Civil Service Commission. After a hearing before the Commission's Regional Board in New Orleans,

it unanimously held that petitioner's dismissal had been illegal and ordered his reinstatement. From this order the Regional Manager of the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission and a further hearing was conducted by that board in Washington, D. C. Under the impression from the advice of the Commission, that the Board of Appeals and Review had decided the case adversely to him, petitioner requested a hearing before the Commission and that he be furnished with the recommendations and findings of the Board of Appeals and Review and the Commission's approval thereof. His request for the recommendations and findings of the Board of Appeals and Review was refused, but he was granted a further hearing before the Commission and the matter was submitted to it on briefs. The Commission then advised him that it had approved its previous decision reversing the findings of the Tenth Regional Civil Service Board and approving the action of the Veterans Administration in removing him from his position. No findings in support of any decisions other than the Regional Decision in his favor were ever furnished him. All of these facts are averred in petitioner's complaint (R. 6-16).

Having exhausted his administrative remedies petitioner filed his complaint in the United States District Court in New Orleans where he resides and the controversy arose. He named as defendants, the Civil Service Commission and the Regional Manager of the Veterans Administration, who also resides in New Orleans. His complaint alleges that the action of the Regional Manager of the Veterans Administration and the Washington proceedings of the Civil Service Commission are illegal and void because they violate the mandatory provisions

of Section 14 of the Veterans Preference Act in that *inter alia*, he was not notified in writing specifically and in detail of the reasons for his discharge and not furnished with findings for the adverse decision of the Civil Service Commission. He prays for a declaratory judgment of his rights under the Veterans Preference Act and ultimately seeks reinstatement to his position and the restoration of his lost pay.

The defendant, L. F. Guerre, Regional Manager of the Veterans Administration at New Orleans, was served and the Civil Service Commission was served through its Regional Director in New Orleans. In accordance with Rule 4 (d) (4) and (5) of the Rules of Civil Procedure, the United States was served through the United States Attorney in New Orleans and a copy of the complaint was served by registered mail on the Attorney General and the Civil Service Commission in Washington, D. C. (R. 2 and 3).

The government moved to dismiss the complaint on the ground of lack of venue and jurisdiction, which motion was dismissed. (R. 3) It then filed its answer (R. 17) and pursuant to the motion of petitioner's counsel filed the record of the Administrative Proceedings in Court (R. 3). Petitioner then filed a motion for summary judgment and the government in turn filed a counter motion for summary judgment and reurged its exception to venue and jurisdiction. The exception to venue was then sustained by the District Court and the action dismissed (R. 4). This decree was affirmed by the Fifth Circuit Court of Appeals which held that the legal residence of the Civil Service Commission was the District of Columbia and that a suit could only be brought against the Commission in the District Court of

the District of Columbia because of the general venue provision of 28 U.S.C.A. 1391 (b). The Court of Appeals further held that the suit could not be transferred to the District of Columbia pursuant to 28 U.S.C.A. 1404 (a) or 1406 (a) because that would be an improper venue for the defendant, L. F. Guerre, a resident of the State of Louisiana. The other questions raised by petitioner were not mentioned by the Court in its decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the United States Civil Service Commission could not be sued in the Eastern District of Louisiana on this cause of action.

2. In failing to recognize and hold that this suit is essentially an action against the United States Government and as such maintainable in the District Court of the Eastern District of Louisiana where the petitioner resides.

3. In failing to recognize that the Civil Service Commission waived its objection to venue by filing the record of the Administrative Proceedings in the District Court of the Eastern District of Louisiana and affirmatively seeking a summary judgment, which was the same remedy sought by the petitioner.

4. If the United States Civil Service Commission was not property subjected to the jurisdiction of the District Court for the Eastern District of Louisiana, the court erred in not sustaining petitioner's alternative contention that it was not an indispensable party to this action.

5. In the alternative, in the event the District

Court was correct in its ruling that it did not have venue in this case, the Court nevertheless erred in dismissing petitioner's complaint, since venue was not a ground for dismissal of the action, and it should instead have transferred it to the proper district.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals for the Fifth Circuit that the Civil Service Comission can only be sued in Washington, D. C., in actions of this type conflicts with the holding of the Court of Appeals for the Fourth Circuit in the case of *Seven Oaks, Inc. v. Federal Housing Administration, et al*, 171 F. 2d 947, and is contrary to and ignores the specific venue provision of the Administrative Procedure Act as set forth in Section 10 (b) thereof, 5 U.S.C.A. 1009 (b), which provision has never been interpreted by this Court. The holding of the Circuit Court of Appeals is also not in accord with the decision of this Court in the case of *Hoeness v. The United States*, 335 U.S. 297, 69 S. Ct. 70.

The application of the concept of residence to a Board or Commission of the United States Government such as the Civil Service Commission is a judicial creation for there is no statutory provision to that effect. This theory fails to recognize that these Commissions are separate entities from the individuals who compose them and are in fact ubiquitous being present as agencies of the United States Government throughout the land and in New Orleans, Louisiana, as well as in Washington, D. C.

The proper rule is that applicable to suits against the United States as recognized by this Court in the case of *Hoeness v. The United States, supra*, in which it said (69 S. Ct. pg. 73):

> • • • "The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land, and unlike private parties, is not centered at one particular place." • • •

The Circuit Court of Appeals decision recognizes that the Civil Service Commission is an entity separate from its members and suable as such. It is so sued in this case. Unlike some other government agencies there is no provision of the law stating that its principal office or place of business shall be the District of Columbia. In fact the provisions of laws on the Civil Service Commission show that it, like the United States, is not to be considered centered in one particular place. Section 17, Veterans Preference Act, 5 U.S.C.A. 866, also 5 U.S.C.A. 632; Political Activities Act, 5 U.S.C.A. 118 k (c) and the decisions under the latter act, particularly *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S. Ct. 544; *Wages v. United States Civil Service Commission*, 170 F. 2d 182 (C.C.A. 6th Circ.); *Stewart v. United States Civil Service Commission*, 45 F. Supp. 697; *State of Ohio v. United States Civil Service Commission*, 65 F. Supp. 776.

The Commission has a substantial staff in New Orleans. It has a Regional Director there, who, with two other members, pass upon the Regional appeals and perform numerous specific duties and possess important powers of the Commission concerning matters covered by the Veterans Preference Act including the conducting of investigations, hearings and the making of decisions on the appeals under this act (Code of Fed. Reg. 1947 Sup. Chap. 1, Secs. 22.6-22.10). The Regional Director is also in practice the general manager of the Commission in this

district, in which there are thousands of federal employees. From the foregoing it would seem clear that the Regional Director is included within the term "Civil Service Commission" as expressly defined by Sec. 17 of the Veterans Preference Act, 5 U.S.C.A. 866. It is reasonable, therefore, to say that the Civil Service Commission is present and functioning and carrying on its business in that jurisdiction and that the service upon the Regional Director in New Orleans was effective service upon the Commission.

The Administrative Procedure Act was enacted to provide adequate judicial review of administrative proceedings and not only did the sovereign thereby consent to such suits, but this statute specifically provides the venue in which such actions may be brought.

5 U.S.C.A., Sec. 1009 "Judicial Review of Agency Action * * * "Form and **venue of proceedings**"

> "(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or *habeas corpus*) **in any court of competent jurisdiction.** * * * " (Emphasis ours)

The express and obvious purpose of the provision just quoted is to state what shall be the proper place or venue of actions to review administrative proceedings.

The cumulative meaning of the provisions of the Administrative Procedure Act is that any authority of the United States Government (other than Congress, etc.) may be sued for a judicial review of its proceedings

"in any court of competent jurisdiction"; that the venue of these proceedings is "any court of competent jurisdiction". Since the District Courts of the United States are courts of general competent jurisdiction, this provision means that such an action may be brought in any United States District Court.

The phrase "any court of competent jurisdiction" is very broad and similar provisions in other federal statutes have been broadly construed. Thus the identical phrase "any court of competent jurisdiction" in the Fair Labor Standards Act (29 U.S.C.A. 216 (b)) has been held to mean any court of general jurisdiction whether Federal, State or Territorial. *Stewart v. Hickman*, 36 F. Supp. 861, and in *Tobin v. Hercules Power Co.*, 63 F. Supp. 434, 435, construing the same phrase the court said appropriately that it:

> "shows the congressional intent to afford employees the obvious advantage of settling small claims in local tribunals."

The Circuit Court of Appeals for the Fifth Circuit has itself held that similar words conferred jurisdiction to the Federal District Courts over rent overcharge cases even where the amount involved is less than $3,000.00. *Garlin v. Currie*, 185 F. 2d 401, following *Adler v. Northern Hotel Co., et al*, 175 F. 2d 619. (7th Circ.). This is also in accord with the decisions of this Court which show that the Administrative Procedure Act is to be liberally construed so as to effectuate its purpose of providing adequate safeguards and remedies against the encroachments of arbitrary administrative actions. *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, and *Universal Camera Corp. v. National Labor Relations Board*, 71 S. Ct. 456.

The judicial review provision of the Political Activities Act, 5 U.S.C.A. 118 k (c) is a law in *pari materia* with the Administrative Procedure Act insofar as the latter applies to the Civil Service Commission. This section of the Political Activities Act provides for the filing of the petition for review "in the district court of the United States for the district in which such officer or employee resides" and that a copy thereof "shall forthwith be served upon the Commission." It was enacted prior to the Administrative Procedure Act and may appear to be more specific in respect to venue. However, it dealt in this respect with only one governmental agency whereas the Administrative Procedure Act dealt with all, hence the broader provisions of the latter; but to give effect to the provisions of the Political Activities Act with reference to service it is obvious that Congress considered the Commission present and subject to service in the District of the plaintiff's residence.

It appears from the foregoing that the United States Civil Service Commission is to be considered present and suable in New Orleans as well as the District of Columbia and that on the question of venue (i.e., the place where the action may be brought) for the review of the Administrative Proceedings, the controlling provision is not the general venue statute 28 U.S.C.A. 1391 (b), but the particular and express provision of Section 10 (b) 5 U.S.C.A. 1009 (b) of the Administrative Procedure Act which clearly does permit the action to be brought in the District Court for the Eastern District of Louisiana since it is a court of competent jurisdiction. This resolves the question to one of service only, namely, whether the service effected on the Civil Service Commission through its Regional Manager in New Orleans was proper service on the Commission. This must

be determined not by the venue statute, but by the law pertaining to service which is Rule 4 (d) (4) and (5) of the Federal Rules of Civil Procedure. Service was made on the United States in specifically the manner required by Rule 4 (d) (4) and (5). Rule 4 (d) (5) provides:

> "Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule."

This leaves only the question whether the delivery of the copy of the summons and complaint on the Civil Service Commission by physical delivery to its Regional Manager in New Orleans was substantial compliance with the above requirement of delivery thereof to the agency. The only reasonable conclusion is that if the Civil Service Commission is suable in New Orleans at all, the normal and proper person upon whom to make such delivery is the Regional Director, its chief representative in the district. This is precisely what was done in the present case. Furthermore, if the Civil Service Commission is an entity separate from its members, as apparently recognized by the Court of Appeals, it is in the nature of, or analagous to, a government corporation, and the reference *supra*, to Section 4 (d) (3) of the rule supports the conclusion that delivery to its Regional Manager constituted delivery to the Commission.

The Case of *Seven Oaks, Inc. v. Federal Housing Administration, supra* is directly in point with this one. In that case it was held that the Federal Housing Administration could be sued in the District Court of the

Eastern District of Virginia and service made through its Regional Director there, where the plaintiff resided and the cause of action arose; that such district was the proper venue of the case. In overruling the government's contention that the Federal Housing Administration could be sued only in the District of Columbia, the court said (171 F. 2d page 948):

> "The statute giving consent to suit is more than a mere waiver of immunity. It provides not only that the agency may be sued, but also in what courts suit may be instituted. The exact language of the statute is: 'the Administrator shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal'. 49 Stat. 722, 12 U.S.C.A. Sec. 1702. There is no more ambiguity in the language used and no more reason to restrict its meaning than there was the meaning of the language permitting suit 'in any United States District Court' in the Railway Labor Act, 45 U.S.C.A. Sec. 151, et seq. See *Robertson v. Railroad Labor Board*, 268 U.S. 619, 623, 624, 45 S. Ct. 621, 623, 69 L. Ed. 119. It is necessary as pointed out in that case, that the court in which suit is brought be able to acquire jurisdiction over the defendant by service of process but where the Housing Administration is doing business within a district and has present an agent in charge of its affairs, there is no reason why service of process cannot be made upon it, and upon the United States, whose representative it is, in accordance with the provisions Rule 4 (d) (4) and (5), Federal Rules of Civil Procedure, 28 U.S.C.A. * * * "
>
> " * * * Provision is made that suits against the United States shall be brought in the district of plaintiff's residence, or, in the case of tort claims, where the act or omission complained of

> occurred. 28 U.S.C.A. section 1402. Suits against officials of the government in their official capacity are suits against the United States. *Krug v. Fox*, 4 Circ., 161, F. 2d 1013, 1018-1020, and cases there cited. There would be no sense in requiring a suit such as this, which is a suit against an official in his official capacity with respect to business transactions of a government agency, to be brought in the District of Columbia, while allowing other suits against the government, where there is less reason to consult the convenience of plaintiffs, to be brought by them in the districts of their residence."

Nor can the above case be distinguished from the present one. The operation of the Civil Service Commission is just as much the business of the Government as is the operation of the Federal Housing Administration. The underlying reason is precisely the same, and that is, that where the government or a corporation transacts its functions in a jurisdiction on a substantial basis through permanent agents of important authority it is unfair and unreasonable that it should not be subject to suit in such jurisdiction by a resident thereof on a matter originating therein.

If the Supreme Court held as it did in *Hoeness vs. United States, supra*, that the United States is ubiquitous, and concepts of residence should not be applied to it, how can the Courts logically limit the venue of the Civil Service Commission to Washington, D. C., in view of its statutory definition, its representations and operations in New Orleans as an agency of the United States Government and the broad provisions of the Administrative Procedure Act with reference to venue? It is submitted that a decree against the Civil Service Commission in this matter by the District Court for the

Eastern District of Louisiana, would be *res adjudicata* against the Commission and binding upon it in the District of Columbia as well as in New Orleans.

2. If the essential nature and effect of the proceedings are such as to make it plain that the judgment sought would expend itself on the public treasury or domain, then the action against an officer or agency of the United States is to be considered essentially an action against the United States itself. *Mine Safety Co. v. Forrestal*, 326 U.S. 371, 66 S. Ct. 219; *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 1009; *Ex parte State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057. It is evident from a reading of the complaint that the remedy sought in this case will expend itself on the United States Government. If the actions of the Regional Manager of the Veterans Administration and the Civil Service Commission complained of by petitioner are annulled, then he is entitled to be restored to his position with the United States Government and it is the one who will have to reimburse him the pay which he lost; and there is no question but that the sovereign has consented to such suits. 5 U.S.C.A. 652 (b) (2); 5 U.S.C.A. 863; *Wittner v. U. S.*, 76 F. Supp. 110; *Gadsden v. U. S.*, 78 F. Supp. 126; *Lamb v. U. S.*, 90 F. Supp. 369; *Stringer v. U. S.* 90 F. Supp. 375.

In failing to recognize that this was in fact a suit against the United States Government, the decision of the Circuit Court of Appeals conflicts with the Supreme Court decision of *Mine Safety Co. v. Forrestal, etc., supra.*

The complaint avers that the amount involved exceeds $3,000.00 and that petitioner's salary with the

Veterans Administration was $5,152.80 per annum and that he was suspended without pay January 2, 1947 and discharged March 2, 1947 (R. 6 and 7). All of these averments are admitted by the government's answer. (R. 17 and 18). The complaint was filed on March 1, 1948, and the rule is that the amount for the purpose of jurisdiction must be determined as of the date suit is filed. 54 Amer. Juris. Sec. 105. Thus it is apparent from the face of the pleadings that as of the date this suit was filed, the monetary amount involved was not more than one year's salary or $5,152.80 which was considerably less and could not have been in excess of the $10,000.00 District Court jurisdictional limitation for suits against the United States, 28 U.S.C.A. 1346, and the proper venue for such actions against the United States is the district of the plaintiff's residence which in this case is the Eastern District of Louisiana. 28 U.S.C.A. 1402.

Furthermore by virtue of the sweeping waiver of governmental immunity effected by the Administrative Procedure Act as to suits for the review of administrative proceedings it appears that the District Court would have jurisdiction of the matter regardless of the amount involved. This is in keeping with the decisions of this Court holding that waiver of governmental immunity must be liberally construed. *United States v. Yellow Cab Co.*, 71 S. Ct. 399; *Keifer and Keifer v. R. F. C.*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 748; *F. H. A. v. Burr*, 309 U.S. 242, 60 S. Ct. 488, 84 L. Ed. 724; *R. F. C. v. J. G. Menihan Corp.*, 312 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595, and consistent with the decision of the Fifth Circuit Court of Appeals in the case of *Garlin v. Currie, supra.*

The United States government was duly served in these proceedings and in view of the foregoing, the District Court should have granted leave to petitioner to amend his complaint so as to name the United States as a party defendant *"eo nomine"*. However, whether it is so specifically named or not it is now well settled that if an action is brought against an agent of the government and the real party in interest is the United States, the Court will consider it as a suit against the United States and render judgment accordingly. *Minnesota v. Hitchcock*, 185 U.S. 373; 22 S. Ct. 650.

Nor is it material that the prayer of the complaint does not specifically ask for a monetary judgment against the United States. A plaintiff is entitled to whatever judgment the facts alleged in his petition justify, irrespective of the provisions of the prayer of his complaint. Rule 54 (c), Federal Rules of Civil Procedure.

3. The Civil Service Commission brought into New Orleans and filed in the District Court there its administrative record of the proceedings. If its position on venue or personal jurisdiction was correct, the District Court was powerless to compel the Commission to bring the record into New Orleans and file the same as it did in the District Court. It appears clear that by this conduct it waived its objection to venue or personal jurisdiction. Any doubt on that score would seem to be eliminated when it went further and affirmatively asked for a summary judgment on the face of that record (R. 4) which was the same relief sought by the plaintiff. Lack of jurisdiction of the person is waived by seeking relief similar to that requested by the other party. *Encyclopedia of Federal Procedure*, Vol. V, Sec. 1555, pg. 137; *Merchant Heat & Light Company v. J. B.*

Clow & Sons, 204 U.S. 286; 27 S. Ct. 285; *Green v. Oberfell*, 123 F. 2d 46, 138 A.L.R. 258, Cert. Den. 314 U.S. 637, 86 L. Ed. 511, 62 S. Ct. 72; *Stevens v. Walker*, 61 F. Supp. 441.

4. In the alternative, petitioner contends that if the Civil Service Commission has not been property subjected to suit in the Eastern District of Louisiana, it is not an indispensable party to this action. If any remedy could be afforded petitioner by the District Court, it should not have dismissed this action. It could surely have rendered judgment against the United States Government for the monetary amount determined to be due him without the Civil Service Commission being a party to the action. The mere fact that the validity of an order of an agency such as the Civil Service Commission is being attacked does not make that agency an indispensable party to the suit. Rule 4 (d) (4) Federal Rules of Civil Procedure; *Dismuke v. U. S.*, 297 U.S. 167; 56 S. Ct. 400; *Wittner v. U. S., etc., supra.* Nor is any affirmative action required of the Commission for petitioner's reinstatement for as to it, all the court need do is to adjudge the nullity of its Washington decision reversing its Regional Decision, and to recognize the latter decision (which held the dismissal illegal and ordered petitioner's reinstatement) to be the lawful and mandatory order of the Commission, 5 U.S.C.A. 863.

5. In the event the District Court was correct in its ruling that it did not have venue in this case, the court nevertheless erred in dismissing petitioner's complaint, since venue was not a ground for dismissal of the action, and it should instead have transferred it to the proper district. At the time the Government filed its motion to dismiss for want of venue, Section 1406 (a) of Title 28, U.S.C.A., read as follows:

> "The District Court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

It is submitted that the Government's motion must be considered on the basis of what the law was at the time its objection was filed and on that basis it was mandatory for the District Judge to transfer and not dismiss the suit if his position was otherwise correct.

The fact that the defendant, Guerre, is a resident of New Orleans does not prevent the transfer of the case, for it could still have been brought in the District of Columbia. It would be optional with the defendant, Guerre, if he wished to urge the objection of venue. If he did urge this objection, it would not defeat the jurisdiction of the Court of the District of Columbia to hear the case *quoad* the United States Civil Service Commission, which under the Government's theory is the only indispensable party.

CONCLUSION

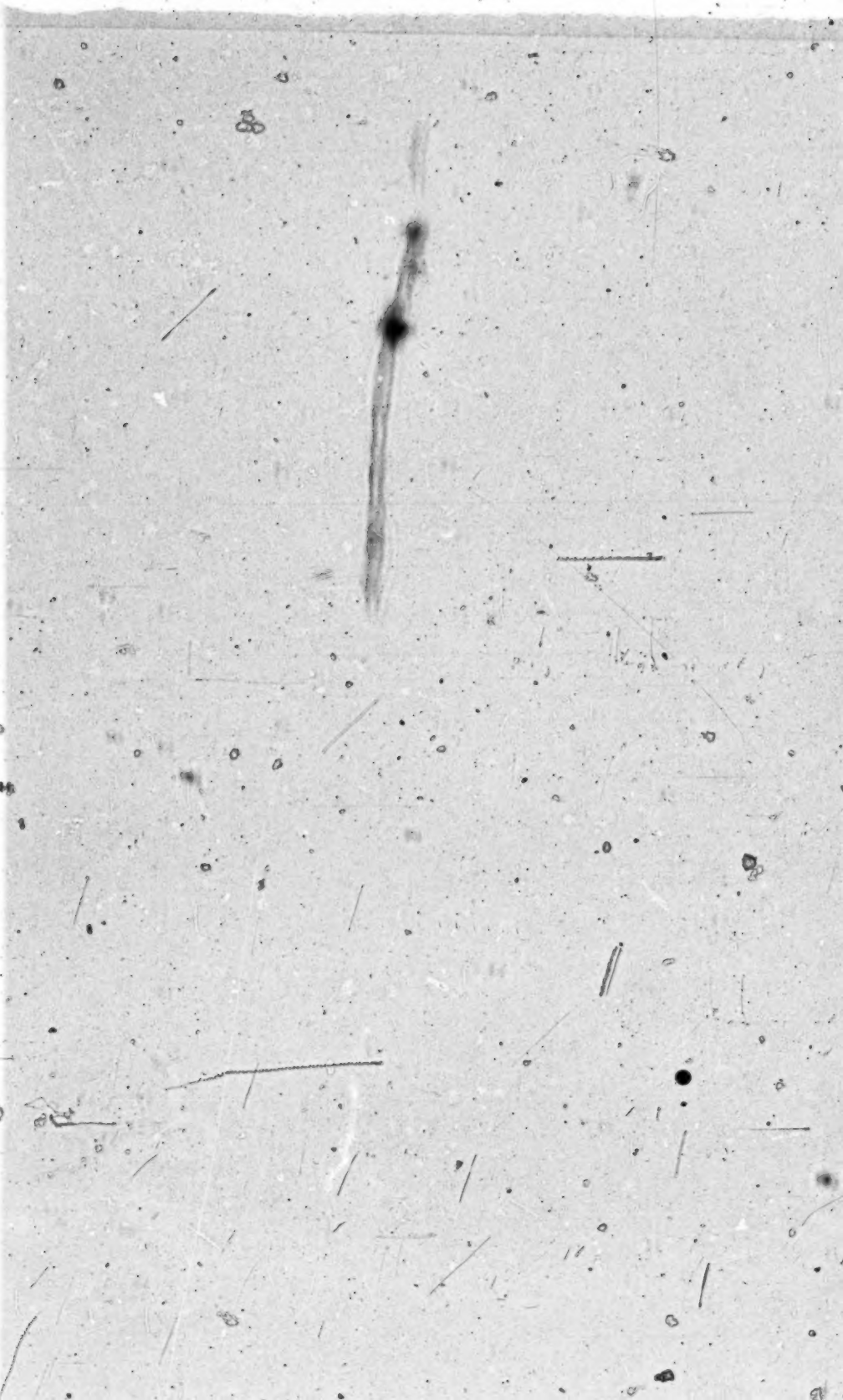
It is important to Veterans and to citizens to know whether suits for the review of administrative proceedings, can be brought only in the District of Columbia where in most cases, because of its distance from the plaintiffs' residence, they cannot in fact litigate, or whether the Administrative Procedure Act does afford them effective redress against the abuses of administrative agencies by permitting the bringing of such actions in a convenient and practical forum, such as the district court of the plaintiffs' residence. The decision below conflicts in fundamental principal with that of decisions of this Court and another Court of Appeals and the

specific question involved has never been settled by any decision of this Court. The question is of substantial public importance. It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ARMAND EDWARD BLACKMAR

By

RENE' R. NICAUD and
CONRAD MEYER III,
Attorneys for Petitioner.



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IN THE

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OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA AND UNITED STATES CIVIL SERVICE COMMISSION,

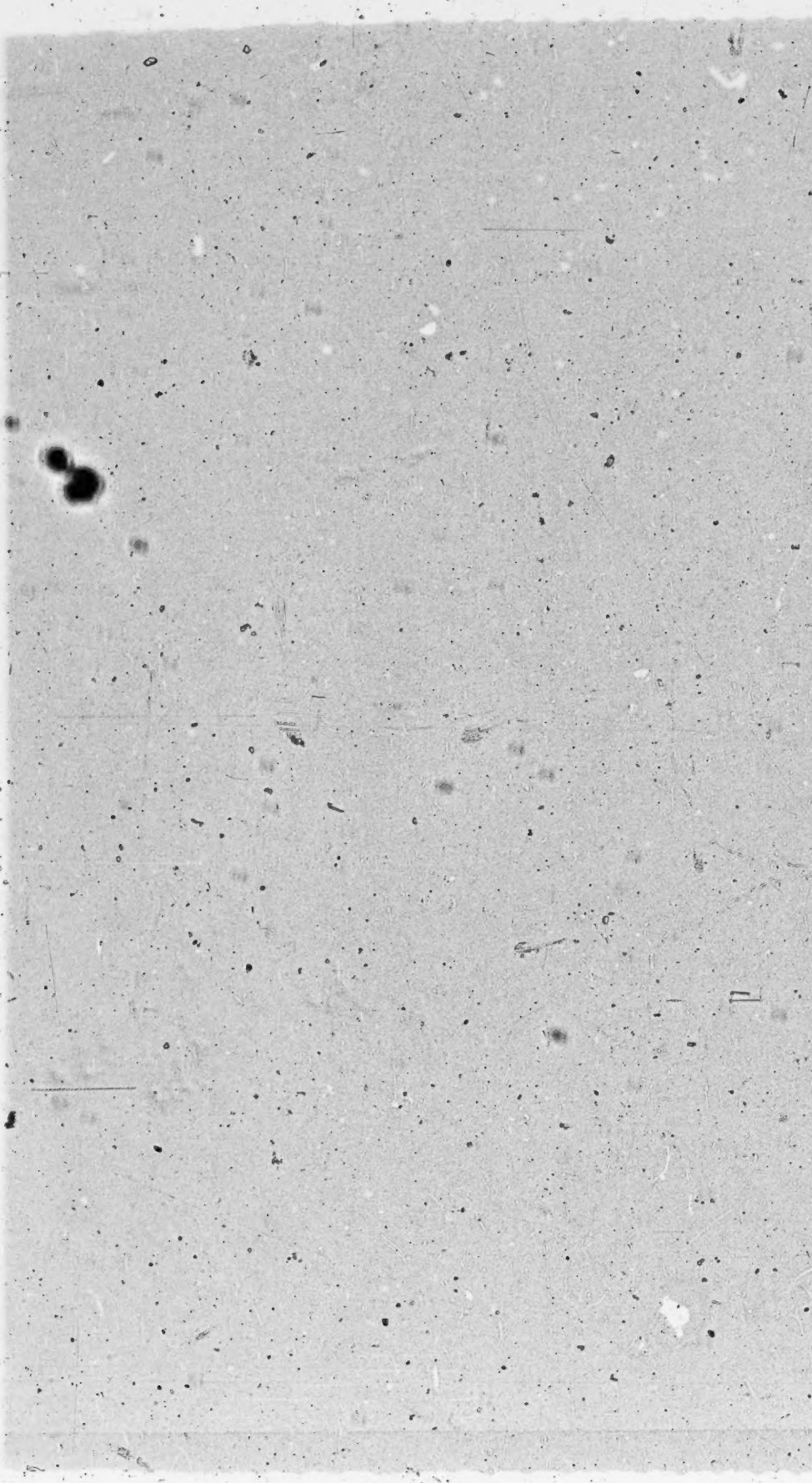
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Certiorari Granted November 26, 1951.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RENÉ R. NICAUD,
HUGH H. BRISTER,
CONRAD MEYER, III.,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS



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IN THE

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Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

This brief is supplementary to the argument and authorities stated in the petition for certiorari.[1]

The government in its brief in opposition to the petition for certiorari urges that the District Court be-

[1] The expense of this litigation has already been substantial. In view of the limited finances of petitioner, we trust the Court will excuse our not repeating herein the original argument and authorities. They are, of course, to be considered first and as though reiterated herein.

low lacks jurisdiction because of some decisions to the effect that the United States District Courts, other than the District of Columbia, do not have authority to entertain original proceedings in mandamus. Neither the District Court, nor the Circuit Court of Appeals agreed with that position. Their decisions were not based on that ground, but on lack of venue.[2]

Independent of the Administrative Procedure Act, under their general jurisdiction, the United States District Courts have the right to review Administrative proceedings where the violations of a mandatory provision of law are involved and a personal right of the plaintiff has been infringed by such violation. *Stark vs. Wickard*, 321 U.S. 288, 64 S. Ct. 559. This is so although one of the remedies sought may be in the nature of mandamus. The present action is not an original suit in mandamus and jurisdiction is not dependent on such process. However, whatever doubt or confusion may have existed previously, it is clear now that under the provisions of Section 10, 5 U.S.C.A. 1009 of the Administrative Procedure Act, the District Courts not only have the right to review Administrative proceedings, but this section directly recognizes the common

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[2] It should be noted also that the Court of Appeals, consistent with its decision in *Bradley Lumber Company of Arkansas, et al v. National Labor Relations Board*, 84 F. 2d 97, recognizes that the Civil Service Commission is an entity distinct from its members. It is in the nature of a government corporation. *Texas & P. R. Co. vs. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 669, and like the United States is not centered in any place and concepts of residence and principal place of business have no relevancy. If we are to apply such concepts at all, however, then under the provisions of 28 U. S. C. A. 1391 (c), venue would be in the Eastern District of Louisiana, in view of the extensive operations of the Commission in that District. Further both by its operations and conduct in this case, the Commission has waived its objection to venue (pet. p. 16). The privilege of venue may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153; *Industrial Addition Ass'n v. Commissioner of Internal Revenue*, 323 U. S. 310, 65 S. Ct. 289.

law actions "for declaratory judgments or writs of prohibitory or mandatory injunctions * * *", as appropriate methods of judicial review. Under this section the authority of the Court includes, if necessary, the express authority "to compel agency action unlawfully withheld" and to issue prohibitory or mandatory writs: *Kristensen vs. McGrath*, 179 F. 2d 796; *U. S. ex rel Trinler vs. Carusi*, 166 F. 2d 457; *United States ex rel Cammarata vs. Miller*, 79 Fed. Sup. 643; and *Fisher vs. Haeberle*, 80 Fed. Sup. 126. These rulings are in accord with the decisions of this Court construing the Administrative Procedure Act, *United States vs. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357; *Wong Yang Sung vs. McGrath*, 339 U.S. 33, 70 S. Ct. 445, and *Universal Camera Corp. vs. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456. To hold otherwise is to emasculate this statute for in almost every case of administrative review the enforcement of the decree would compel the agency to do what it had previously been unwilling to do.

Even if the District Court below could not grant mandatory relief, it would nevertheless have had jurisdiction to review the administrative proceedings and to have rendered a declaratory judgment as to the validity of the proceedings and as to petitioner's rights. 5 U.S.C.A. 1009 (b), 28 U.S.C.A. 2201, 2202. The Declaratory Judgment Act has enlarged the remedies available in Federal District Courts. *United Public Workers vs. Mitchell*, 330 U.S. 75, 67 S. Ct. 556; *Skelly Oil Co. vs. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876; *McGrath vs. Kristensen*, 340 U.S. 162, 71 S. Ct. 224.

The term "civil action" as used in 28 U.S.C.A. Sec. 1346, providing for the original jurisdiction of the District Courts of suits against the United States, includes

any suit or claim against the United States if it is within the amount limitation and not within the exceptions therein expressly stated. "The reach of 'any civil action' is unmistakable." *Ex Parte Collett*, 337 U.S. 55, (p. 58) 69 S. Ct. 944, (p. 946).

The point raised by the government on page 8 of its brief, footnote 4, that petitioner is "an officer" of the United States and therefore under 28 U.S.C.A., Section 1346 (d) (2), the District Court does not have jurisdiction of his action, was never made before by the government in this case. It makes its first appearance in the government's Supreme Court brief. There is no substance to this contention. In his complaint petitioner alleged that he was an employee of the government (Art. 1, R. 6; Art. 5, R. 7) and the government admitted this fact in its answer (R. 17 and R. 18, Arts. 5 and 6). The government is bound by the admissions in its pleadings and should not be permitted to reverse its position by the belated injection of such an issue at this stage of the case. Actually, however, petitioner was not an officer of the United States since he did not hold his position by appointment of the President, the Courts of law, or any head of department under Article 2, Section 2 of the United States Constitution.[3]

With respect to the alternative position of petitioner that if the District Court below is correct in its position

[3] This point has been well settled since 1879 when the leading case of *United States v. Germaine*, 99 U. S. 508, was decided by this Court. Also *Burnap v. U. S.*, 252 U. S. 512, 40 S. Ct. 374, *Scully v. U. S.*, 193 F. 185. The amendment of October 31, 1951, to Sec. 1346 (d) (2) so as to include "employees" within the purview of this exception, therefore, effects a radical change in the existing law. The quoted statement (fn 4 of p. 8 Rep. brief) from the Congressional Record is incorrect and very misleading. This amendment may be another example of "The Erosion of the Administrative Procedure Act." See the excellent article under this title by Charles S. Rhyne in the September 1951 issue of the American Bar Association Journal.

that it did not have venue, it should have transferred rather than dismissed, the case, both the Circuit Court of Appeals in its decision and the government rely on the case of *Foster-Milburn Co. vs. Knight*, 181 F. 2d 949 (C.A. 2) and *Shapiro vs. Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9). These cases conflict with the holding of the Ninth Circuit Court of Appeals in the case of *Paramount Pictures vs. Rodney*, 186 F. 2d 111, cert. den. March 26, 1951, 340 U.S. 953, 71 S. Ct. 572. Note also, *Otto vs. Hirl*, (D.C. Iowa, 1950) 89 Fed. Sup. 72. The latter cases correctly construe the transfer provisions of the Judicial Code and under these decisions it is clear that the Court below should in no event have dismissed the suit. Further the fact that the Civil Service Commission (the only indispensable party in the government's view of the case) is amenable to service in the District of Columbia distinguishes the instant case from the *Foster-Milburn Co. vs. Knight* and *Shapiro vs. Bonanza Hotel Co.*, cases.

In view of the argument and authorities presented in the Petition for Certiorari, as supplemented by the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals and of the District Court should be reversed.

RENÉ R. NICAUD,
HUGH H. BRISTER,
CONRAD MEYER, III.,
Attorneys for Petitioner.

January 1952.

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IN THE

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versus

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

MEMORANDUM OF PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL MEMORANDUM.

RENÉ R. NICAUD,
HUGH H. BRISTER,
CONRAD MEYER III,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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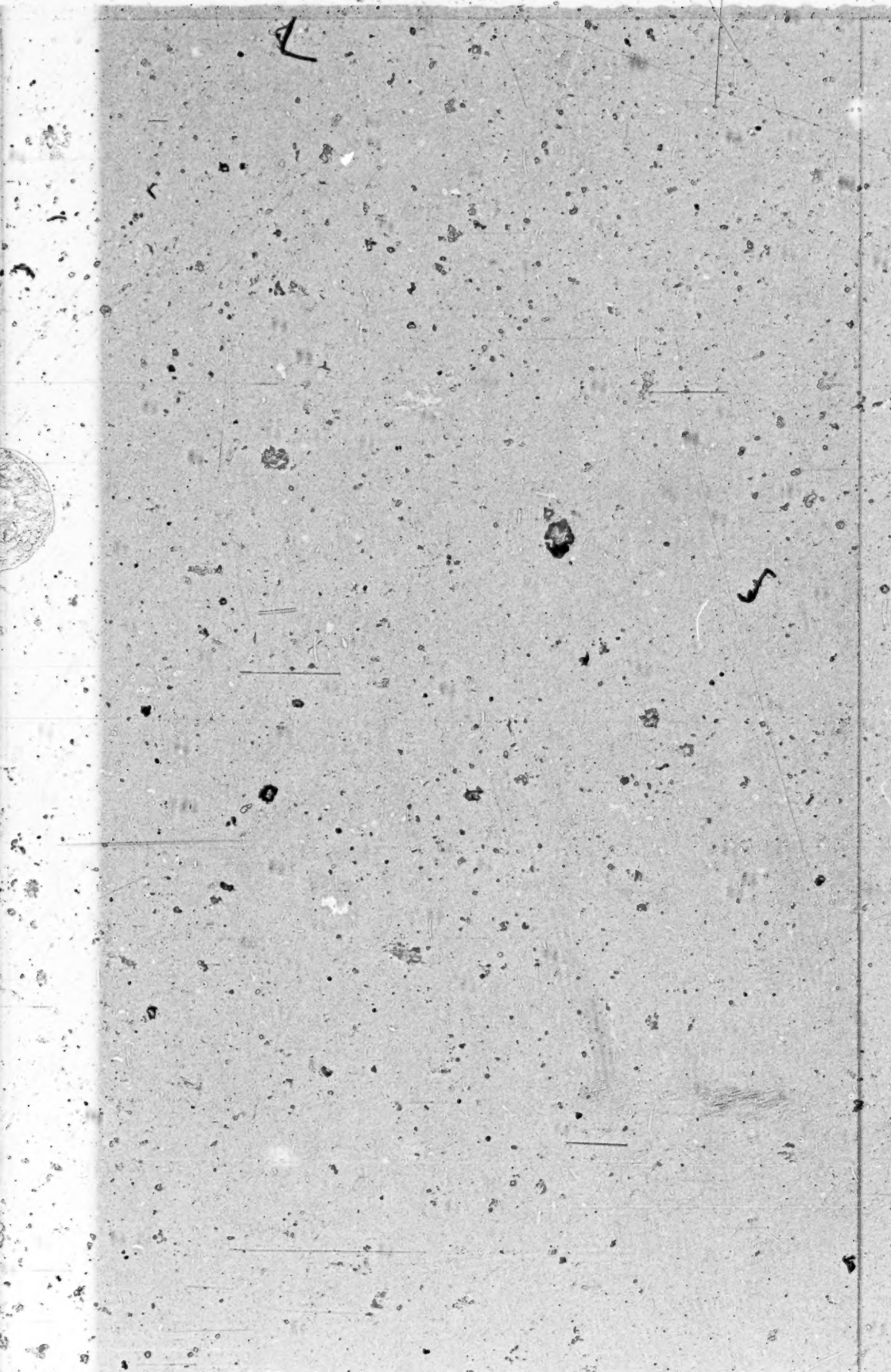

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MEMORANDUM OF PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL MEMORANDUM.

In its presentation of this case the Government has conspicuously ignored the following provision of Section 1 of the Administrative Procedure Act:

5 U.S.C.A. Sec. 1001. "Definitions"

"As used in this chapter * * *"

Agency

"(2) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the government of the possessions, Territories,

or the District of Columbia" * * * (Emphasis ours)

The impact of this provision cannot be thus avoided. Section 10 of the Administrative Procedure Act provides in effect that every[1] final agency action is subject to judicial review in any court of competent jurisdiction. Section 1, *supra*, defines "agency" as "each authority of the Government of the United States". The question then as to whose act is subject to judicial review is expressly and unmistakably answered as that of the sovereign. Unless we are to pervert the clear meaning of the plain words of the English language the conclusion is inescapable that by this act, Congress recognized the responsibility of the United States Government for the arbitrary or unlawful acts of its administrative agencies and consented to action for the judicial review and redress thereof in its courts.

Even under a strict construction the explicitness of the above provisions should leave no doubt but that sovereign consent has been granted for the judicial review of administrative proceedings. The jurisprudence, however, is clear that such provisions should be liberally construed. "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399; *Keifer and Keifer v. R. F. C.*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 748; *Federal Housing Administration v. Burr*, 309 U.S. 242, 60 S. Ct. 488, 84 L. Ed. 724; *R.*

[1] Such exceptions as may exist are not pertinent to this case. Nor is the scope of judicial review at issue at this stage. It is conceded that a judiciable controversy is presented. It should be noticed, however, that the scope of judicial review is expressly set forth in Section 10 (e), 5 U.S.C.A. 1009 (e) of the Administrative Procedure Act, which includes, but is clearly not limited to, failure to observe required procedure.

F. C. v. J. G. Menihan Corp., 312 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595. And the contention that this rule applies only when the instrumentality is a corporation in the strict commercial sense of incorporation under some type of charter, is without reason or merit. For example, this Court has applied the rule of liberal construction of waiver of sovereign immunity to the Federal Housing Administration which is not incorporated, *Federal Housing Administration v. Burr, supra*, and held in that case, that suit could be maintained against the Federal Housing Administration, as such, though the act provided for suit against the Administrator. Nor are any special words such as "sue and be sued" [2] required to evidence sovereign consent. " * * * such a clause is not a ritualistic formula which alone can engender liability. * * * " *Keifer & Keifer v. R. F. C., supra.* Irrespective, therefore, of whether the Civil Service Commission is a legal entity or not, since sovereign consent so patently exists, the district court would have jurisdiction and venue of this action as one against the United States Government.

The Civil Service Commission is a legal entity. This is clear from the statutes on the subject. The Veterans Preference Act, as well as the Hatch Act refer in the same manner to the Commission as a body. No reference is made in the Veterans Preference Act to the Commissioners or to the individual members of the Commission.[3] The legal entity status is not limited to

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[2] Although these words do not appear in the Administrative Procedure Act, neither are they used in the Hatch (Political Activities) Act, 5 U.S.C.A. 118 (i)-118 (n), which the Government, with considerable inconsistency, recognizes as authorizing suit against the Commission.

[3] For example, Sec. 14 of the Act, 5 U.S.C.A. 863, includes the provision:

> * * * "the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends. * * * "

corporations in the strict commercial sense or to those that exist by virtue of charters of some type, such as the Reconstruction Finance Corporation. Thus the following have been held to be legal entities or government corporations: The Interstate Commerce Commission, *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U.S. 197, 16 S. Ct. 666; the Federal Housing Administration, *Federal Housing Administration v. Burr, supra; Seven Oaks, Inc. v. Federal Housing Administration, et al*, 171 F. 2d 947; The Railroad Labor Board, *Robertson v. Railroad Labor Board*, 268 U.S. 619, 45 S. Ct. 621; the National Relations Board, *Bradley Lumber Company of Arkansas, et al v. National Labor Relations Board*, 84 F. 2d 97. The Civil Service Commission itself recognizes that it is a legal entity and initiated judicial proceeding as such in the District Court for the Middle District of Tennessee. See *Wages, et al v. United States Civil Service Commission*, 170 F. 2d 182. In fact the Fifth Circuit Court of Appeals in its decision recognizes that the Civil Service Commission is a suable entity as sued in this case. Authority to sue or be sued is not essential for the entity status, but the Administrative Procedure Act does clearly authorize actions against each authority of the United States Government for the purpose of judicial review. There is no basis, therefore, for the contention that when the Administrative Procedure Act provides for the judicial review of the Commission's administrative acts, as an authority of the United States Government, the action should be brought against the individuals rather than against the Commission as a body.

Several pages of the Government's supplemental memorandum are expended to show that the Hatch Act provided expressly for the judicial review of the Civil

Service proceedings involving State employees in activities financed by the United States Government, but made no such provision as to Federal employees. The Government ignores completely, however, the fact that this serious defect, pointed out by Senator Norris in the quotation in its supplemental memorandum, was cured by the subsequent enactment of the Administrative Procedure Act, the provisions of which now afford judicial review to all aggrieved employees.

Obviously, the question is not whether the Hatch Act affords petitioner judicial review, but whether in bringing an action for judicial review under the Administrative Procedure Act, the Civil Service Commission should be considered a different being, than it is in an action for judicial review under the Hatch Act. It is true that the Administrative Procedure Act does not list by name the numerous administrative agencies covered by its generic provisions. It covers them all and in this respect differs from the Hatch Act which deals only with the Civil Service Commission. The Hatch Act is in *pari materia*, however, with the Administrative Procedure Act insofar as the latter applies to the Civil Service Commission; and in determining whether Congress considers the Commission a legal entity it is proper to consult the Hatch Act and to be guided by its provisions. Certainly Congress did not intend the anomalous situation, for which the Government now contends, namely, that the Civil Service Commission when sued by State employees for judicial review under the Hatch Act should be sued as an entity, but when Federal employees sued the same authority under the judicial review provisions of the Administrative Procedure Act, the action must be brought against the individual members. This "is to infer Congressional idiosyncrasy". *Keifer and Keifer*

v. R. F. C., supra (306 U.S. pg. 393). None of the authorities cited by the Government support this absurd proposition.

Service of Process from a district court is not effective beyond the territorial limits of the State in which it is held, Rule 4 (f) of the Federal Rules of Civil Procedure. The Hatch Act authorizes the bringing of the review action at the plaintiff's residence, but makes no provision for extra-territorial service. Therefore, when it requires service of the petition for review on the Commission, Congress necessarily shows that it considers the Commission present and subject to service in each of the United States.

The Administrative Procedure Act has been heralded as a Bill of Rights for American citizens against the abuses of administrative agencies of the Federal Government. It was intended to afford effective judicial redress against these abuses. If the Government's construction is placed upon this act, and the only available forum is in the District of Columbia, the vast majority of people cannot obtain redress because of the remoteness of the Court. Laws are not to be construed so as to perpetuate the rigidities and technicalities they were designed to eliminate. They are to be construed so as to effectuate, rather than frustrate their purpose.

Respectfully submitted,

RENÉ R. NICAUD,
HUGH H. BRISTER,
CONRAD MEYER III,
Attorneys for Petitioner.

February 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The memorandum order of the United States District Court for the Eastern District of Louisiana (R. 23) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 37-39) is reported at 190 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1951 (R. 40). The petition for

a writ of certiorari was filed on October 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, both courts below were correct in holding that this action should be dismissed because venue was improperly laid in the District Court for the Eastern District of Louisiana.

STATUTES INVOLVED

28 U.S.C. [Supp. IV] 1391 (b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

28 U.S.C. [Supp. IV] 1406 (a) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

STATEMENT

On January 2, 1947, respondent L. F. Guerre, the Regional Manager of the Veterans Administration at New Orleans, notified petitioner, an honorably discharged veteran of World War I, in writing of charges against him and of his proposed discharge as authorization officer, P & S-4, in the Regional Office in New Orleans (R. 9). After petitioner filed an answer to the charges, respondent Guerre advised petitioner by letter dated

February 14, 1947, that he would be separated from his duties effective at the close of business March 2, 1947 (R. 8, 9).

On February 21, 1947, petitioner filed an appeal under Section 14 of the Veterans Preference Act of 1944 with the Tenth Regional Office of the United States Civil Service Commission. The Regional Board concluded, after a hearing, that petitioner's separation was not warranted, and recommended that he be restored to his position (R. 8). From this decision, the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission in Washington, D. C. (R. 8). Following a hearing in Washington, the Commission informed petitioner that it had reversed the findings of the Tenth Regional Civil Service Board and had approved the action of the Veterans Administration removing him from office (R. 8). Petitioner was then granted a further hearing before the Commission, which reaffirmed the propriety of petitioner's separation (R. 8).

On March 31, 1948, petitioner instituted this suit in the District Court for the Eastern District of Louisiana (R. 6-16), contending that his removal was illegal and praying that the United States Civil Service Commission be ordered to direct the reinstatement of the petitioner to his former position and that petitioner be compensated from the date of separation to the date of payment (R. 15). The United States Civil Service Commission and L. F. Guerre, the Regional Manager of the Veterans Administration, were named as defendants (R. 1). Respondents moved to dismiss the complaint because of improper venue and lack of juris-

diction (R. 3). After this motion was denied (R. 3), respondents filed an answer which, by way of separate defense, reasserted the defenses of improper venue and lack of jurisdiction (R. 19-20). Petitioner then moved for summary judgment, and respondents filed a counter-motion for summary judgment (R. 4). The district court granted respondents' motion, holding that it lacked jurisdiction over the persons of the United States Civil Service Commissioners because of improper venue, and dismissed petitioner's suit on the ground that the Commissioners are indispensable parties to the action who had not and could not be subjected to the jurisdiction of the court (R. 23). On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment below without prejudice to further proceedings by petitioner in the proper venue (R. 37-40).

ARGUMENT

The decision of the court below, dismissing the complaint without prejudice for improper venue, is, we submit, clearly correct; there is no conflict, and no other ground for review by this Court.

In this suit, petitioner challenges the decision of the United States Civil Service Commission which reversed the findings of the Tenth Civil Service Regional Board and approved the action of the Veterans Administration removing him from his position—a decision which is binding upon the employing agency.[1] Petitioner prays that he "is entitled to an order from the United States Civil

[1] Section 14 of the Veterans Preference Act (5 U.S.C. (Supp. IV) 863) provides that "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends."

Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration" (R. 15). It is clear, therefore, that the Civil Service Commissioners are indispensable parties to this suit, and so the courts have held in comparable cases. *Money* v. *Wallin*, 186 F. 2d 411 (C.A. 3), certiorari denied, 341 U.S. 935; *Podovinnikoff* v. *Miller*, 179 F. 2d 937, 938 (C.A. 3); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, 101 (C.A. 4). Cf. *Williams* v. *Fanning*, 332 U. S. 490, 493.

It is equally clear, as the court below pointed out, "that the Commission's official situs and legal domicile is in the District of Columbia, where its plenary powers are exercised, though many of its subordinate and ministerial functions are necessarily carried out locally by regional officials who act, not by virtue of their own authority, but solely under the control and direction of the Commission" (R. 38). Cf. *Podovinnikoff* v. *Miller*, *supra*; *Clement Martin* v. *Dick Corp.*, 97 F. Supp. 961 (W.D. Pa.); *Hartmann* v. *Federal Reserve Bank of Philadelphia*, 55 F. Supp. 801 (E.D. Pa.). Since 28 U.S.C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," it follows that venue was improperly laid in the District Court for the Eastern District of Louisiana. Cf. *Putnam* v. *Ickes*, 78 F. 2d 223 (C.A.D.C.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).[2]

[2] Petitioner's argument that Section 10 (b) of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009 (b),

To meet this basic obstacle to the maintenance of the action herein, petitioner primarily argues that the action is not against the Commissioners themselves as individuals but against the Commission as an entity and agency of the United States—that, for all intents and purposes, the proceeding is against the United States. Since the United States is ubiquitous, petitioner contends that venue may be laid in any court of competent jurisdiction (Pet. p. 16).

By so arguing, however, petitioner raises a further bar to the maintenance of his cause. If, despite the fact that the United States has not been named, this suit is one against the United States, rather than a suit against officers of the United

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which permits suit to be brought "in any court of competent jurisdiction," waives the subsequently enacted venue requirements of 28 U.S.C. 1406 (a) (Pet. p. 8) is without merit. The legislative history of the Administrative Procedure Act reveals the express Congressional understanding that Section 10 (b) "does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety." S. Doc. No. 248, 79th Cong., 2nd Sess. p. 276. See also Representative Walter's statement to the same effect, p. 369. Moreover, since petitioner requests mandatory relief against the Commission, asserting that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position * * *" (R. 15), it is evident that the district court below is not a court of competent jurisdiction within the meaning of Section 10 (b) of the Administrative Procedure Act. For it is well settled that district courts other than the District Court for the District of Columbia have no authority to grant relief in the nature of mandamus. *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109, 110; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C.A. 1). That petitioner also requests declaratory relief does not alter the rule. *Marshall* v. *Crotty*, *supra*; *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.).

States, the district court below has jurisdiction only if the United States has expressly consented to be sued. Cf. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682.[3] In so far as petitioner seeks to be restored to his position in the Government service, there can be no question that neither the Veterans' Preference Act, nor any other act, including the Tucker Act, authorizes suit for such relief against the Commission as an entity, the employing agency, or the United States *eo nomine*, and petitioner does not point to any such grant of jurisdiction. And insofar as petitioner prays to be compensated from the date of separation to the date of payment, it is equally plain that that relief cannot be obtained in the district courts because the courts lack jurisdiction over the subject matter of such a claim. At the time this suit was instituted, 28 U.S.C. 1346 (d) (2) provided that "the district courts shall not have jurisdiction under this section of any civil action to recover fees, salary, or compen-

[3] Where Congress has conferred jurisdiction upon the district courts to entertain suits against the Civil Service Commission as an entity, it has done so expressly. See Sec. 12 (c) of the Hatch Act of August 2, 1939, 53 Stat. 1147, as amended, 54 Stat. 767, 5 U.S.C. (Supp. IV) 118 k (c); cf. *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. Parenthetically, it may be noted that Section 12 (c) of the Hatch Act specifically deals with the problem of venue, providing that "any party aggrieved by any determination or order of the Commission under subsection (b) may * * * institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides * * *." In this connection, it should also be pointed out that the holding in *Seven-Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4), that the Federal Housing Administration may be sued in any court of competent jurisdiction, is based on a specific provision in the National Housing Act, 49 Stat. 722, 12 U.S.C. 1702, which declares that the Federal Housing Administrator may sue or be sued.

sation for official services of officers of the United States."[4] Such actions lie only in the Court of Claims. Cf. *Borak* v. *Biddle*, 141 F. 2d 278, 281 (C.A.D.C.), certiorari denied, 323 U. S. 738; *Wittner* v. *United States*, 110 C. Cls. 231. Accordingly, under petitioner's theory of the case, the action falls for lack of jurisdiction.[5]

Petitioner further contends that respondents waived their objection to venue by filing an answer on the merits. Petitioner thus ignores the fact that, prior to the filing of the answer, respondents

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[4] That petitioner comes within the purview of Section 1346 (d) (2) is made clear by an amendment to that Section enacted on October 31, 1951. As amended, Section 1346 (d) (2) reads (P.L. 248, 82d Cong., 1st Sess.):

> (d) The district courts shall not have jurisdiction under this section of:
>
> (2) Any civil action or claim to recover fees, salary or compensation for official services of *officers or employees* of the United States. [Emphasis added].

Discussion of the bill on the floor of the House reveals that this amendment is intended to be "merely clarifying and corrective as to certain titles of the code" and not a change in substantive law. 97 Cong. Rec. 13945 (daily ed.).

Prior to the passage of this amendment, this Court granted certiorari in *Joseph B. Bruner* v. *United States*, No. 391, this Term, certiorari granted, October 22, 1951, which expressly raised the question of whether a government civilian fire fighter was an "officer" within the meaning of Section 1346 (d) (2). The explanation by Congress that the term "officers" is meant to include "employees" of the United States makes clear the correctness of the ruling of the lower court in the *Bruner* case (190 F. 2d 427, C.A. 5). In the instant case, petitioner's position as authorization officer with the Veterans Administration is clearly in the class of "officers" of the United States, thus bringing him within the purview of Section 1346 (d) (2) as it read both prior and subsequent to its amendment.

[5] Moreover, under *United States* v. *Sherwood*, 312 U.S. 584, respondents Guerre and the Civil Service Commission could not properly be joined as parties to a suit against the United States under the Tucker Act.

expressly raised the question of venue in a motion to dismiss, and that the question was again raised by way of separate defenses in the answer itself (R. 3, 19). Rule 12 (b) of the Federal Rules of Civil Procedure expressly provides that objections to jurisdiction or venue can be made by answer or motion. In this case it was done by both. In these circumstances, it is now settled that, having made its objections to jurisdiction or venue under Rule 12 (b), a defendant does not waive his defenses by answering on the merits. Cf. *Hoiness* v. *United States*, 335 U.S. 297, 301-302; *Untersinger* v. *United States*, 172 F. 2d 298 (C.A. 2); *Orr* v. *United States*, 174 F. 2d 577 (C.A. 2); *Orange Theatre Corporation* v. *Rayherstz Amusement Corporation*, 139 F. 2d 871, 874 (C.A. 3).

Lastly, petitioner urges that, if venue was improperly laid in the district court below it was mandatory under the language of 28 U.S.C. 1406 (a), as it appeared at the time suit was brought, for the court to "transfer such case to any district or division in which it could have been brought" (Pet. p. 17-18). Assuming this to be so,[6] the court

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[6] As amended on May 24, 1949 (63 Stat. 101), Section 1406 (a) now vests discretion in the court to make the transfer "if it be in the interest of justice." Although the original form of Section 1406 (a) apparently made such transfer mandatory, the legislative history of the amendment thereto reveals that Congress did not so intend. Thus, the House Committee on the Judiciary stated: "This section removes an ambiguity in section 1406 (a) of title 28, U.S.C., by substituting 'may' for 'shall', thus making it clear that the court may decline to transfer a case brought in the wrong district under circumstances where it would not be in the interest of justice to make such transfer." H. Rept. No. 352, 81st Cong., 1st Sess., p. 14; see also S. Rept. No. 303, 81st Cong., 1st Sess., p. 4. In any event, since the amended version was in force at the time respondents' first motion was denied on June 13,

nevertheless correctly refused to transfer the action to the District Court for the District of Columbia since, as respondent Guerre is a resident of Louisiana, the suit could not have originally been brought in the District of Columbia.[7] Cf. *Putnam* v. *Ickes*, 78 F. 2d 223 (C.A.D.C.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).

1949, that language and not the original form of Section 1406 (a) is herein applicable. Cf. *Untersinger* v. *United States*, 87 F. Supp. 532 (S.D.N.Y.), affirmed, 181 F. 2d 953 (C.A. 2); *Orr* v. *United States*, 174 F. 2d 577, 580 (C.A. 2).

[7] It should be noted that, since the action was dismissed without prejudice, petitioner can, of course, institute a new action in the District of Columbia. If the employing agency be deemed an indispensable party, petitioner can obtain jurisdiction over the Veterans Administration by naming the Veterans Administrator a party defendant instead of respondent Guerre, the Regional Manager of the Veterans Administration, who has no independent statutory authority but is delegated authority by the Veterans Administrator.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
BENJAMIN FORMAN,
SIDNEY J. MACHTINGER,
Attorneys.

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No. 361

In the Supreme Court of the United States

OCTOBER TERM, 1951

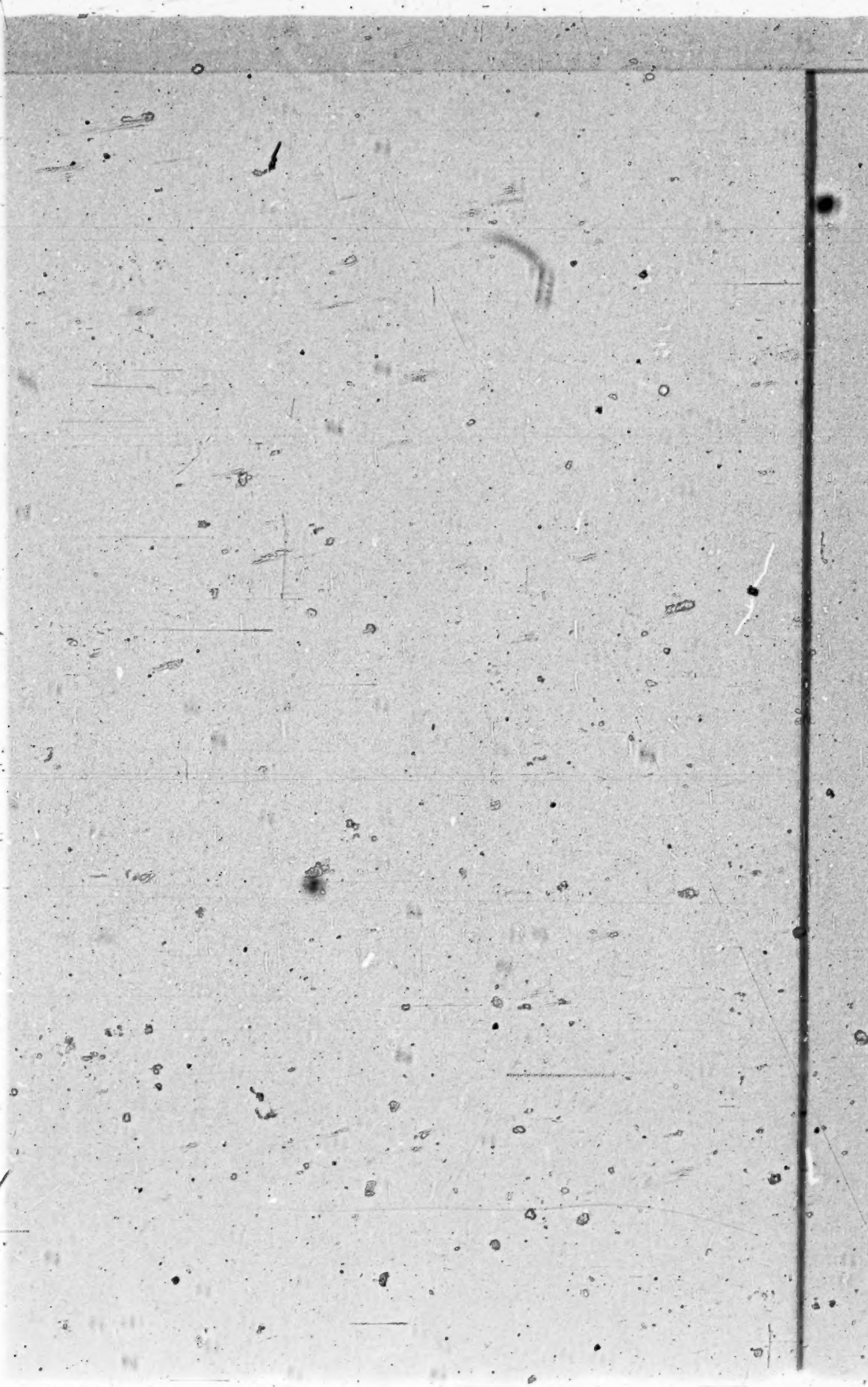
ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS



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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. G. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The memorandum order of the United States District Court for the Eastern District of Louisiana (R. 23) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 37–39) is reported at 190 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1951 (R. 40). The petition for a writ of certiorari was filed on October 1,

1951, and was granted on November 26, 1951 (R. 40). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, a veteran of World War I, was discharged from his position in the New Orleans Regional Office of the Veterans Administration by the Regional Manager, and the propriety of his discharge was affirmed by the United States Civil Service Commission. In this action, which was brought in the District Court for the Eastern District of Louisiana against the Regional Manager of the Veterans Administration and the Civil Service Commission, petitioner challenges the validity of his removal and states that he seeks a money judgment for back pay, an order restoring him to his job, and a declaratory judgment as to his rights.

The broad question presented is whether this action can be maintained in the District Court for the Eastern District of Louisiana. Stated more specifically, the questions are these:

1. If this is a suit against the United States or its agencies, has Congressional consent been given to a suit seeking such relief in the federal district courts?

2. If Congressional consent has been given to a job-restoration suit of this type against agencies of the United States, is the Eastern District of Louisiana the proper venue for the present action

and did the District Court have jurisdiction *in personam* over the Commission?

3. If the suit is against the respondents as individual officers alleged to be exceeding their statutory authority:

(a) Was venue properly laid in the Eastern District of Louisiana?

(b) Did the District Court obtain jurisdiction *in personam* over the Civil Service Commissioners?

(c) Did the District Court have jurisdiction to order petitioner restored to his job or to declare that he was entitled to restoration?

4. Did respondents waive the defenses of improper venue, want of jurisdiction *in personam*, and want of jurisdiction to grant the relief requested by petitioner?

5. Is the change of venue provision of 28 U. S. C. 1406 (a) applicable, and, if so, should the action have been transferred to the District Court for the District of Columbia?

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Sections 1346 (d) (2), 1391 (b) and 1406 (a) of Title 28, United States Code, and Rules 4 (d) (1), 4 (d) (3), 4 (d) (4), 4 (d) (5), 4 (f), 12 (b), and 12 (h) of the Federal Rules of Civil Procedure, and the pertinent provisions of Section 10 of the Administrative Procedure Act (5

U. S. C. 1009) are set forth in the Appendix, *infra*, pp. 78–82.

STATEMENT

On January 2, 1947, respondent L. F. Guerre, the Regional Manager of the Veterans Administration at New Orleans, Louisiana, notified petitioner, an honorably discharged veteran of World War I, in writing of charges against him and of his proposed discharge as authorization officer, P & S–4, in the Regional Office in New Orleans (R. 9). After petitioner filed an answer to the charges, respondent Guerre advised petitioner by letter dated February 14, 1947, that he would be separated from his duties effective at the close of business March 2, 1947 (R. 8, 9).

On February 21, 1947, petitioner filed an appeal under Section 14 of the Veterans Preference Act of 1944 (5 U. S. C. (Supp. IV) 863) with the Tenth Regional Office of the United States Civil Service Commission. The Regional Board concluded, after a hearing, that petitioner's separation was not warranted, and recommended that he be restored to his position (R. 8). From this decision, the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission in Washington (R. 8). Following a hearing in Washington, the Commission informed petitioner that it had reversed the findings of the Tenth Regional Civil Service Board and had approved the action of the Veterans

Administration removing him from office (R. 8). Petitioner was then granted a further hearing before the Commission, which reaffirmed the propriety of petitioner's separation (R. 8).

On March 31, 1948, petitioner instituted this suit in the District Court for the Eastern District of Louisiana (R. 6–16). The United States Civil Service Commission and L. F. Guerre, the Regional Manager of the Veterans Administration, were named as defendants (R. 1). Service of the summons and complaint was made as follows: Personal service was effected in New Orleans on respondent Guerre and on Robert Weinstein, then United States Attorney for the Eastern District of Louisiana; service by registered mail was made on the Attorney General of the United States at Washington, D. C., and on the United States Civil Service Commission at Washington, D. C.; in addition, personal service was made on A. J. Leach, Regional Director of the Tenth United States Civil Service Region in New Orleans (R. 2, 3).

The complaint alleged that the action of respondent Guerre was illegal on the grounds that the charges against petitioner were not stated specifically and in detail as required by Section 14 of the Veterans Preference Act of 1944, that the charges did not constitute such cause as would promote the efficiency of the service and thus could not provide a lawful basis for dismissal

under Section 14 of the Veterans Preference Act of 1944, that petitioner was not afforded a fair hearing by the Veterans Administration, and that there was no substantial evidence to support the charges (R. 9). With respect to the action of the Civil Service Commission in granting the Veterans Administration an appeal and in reversing the findings of the Tenth Regional Civil Service Board, the complaint averred that such action was illegal for the reasons that the regulations of the Civil Service Commission allowing an appeal from the decision of the Regional Board are unauthorized by the Veterans Preference Act of 1944, that the appeal by the Veterans Administration was not timely filed, that the Commission denied petitioner a fair hearing, and that the decision of the Commission was not supported by substantial evidence. (R. 10–13).

Petitioner prayed that the court set aside and annul the action of respondent Guerre suspending and discharging petitioner from his position with the Veterans Administration, and set aside and annul the action of the Civil Service Commission granting the Veterans Administration an appeal from the decision of the Tenth Regional Civil Service Board and approving his discharge (R. 15). Petitioner further prayed for a declaratory judgment that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his

aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position from January 2, 1947 to the date of the payment thereof * * *" (R. 15).

On June 1, 1948, respondents moved to dismiss the complaint because of improper venue and lack of jurisdiction (R. 3). After this motion was denied (R. 3), respondents filed an answer on August 2, 1949, denying the material allegations of the complaint (R. 17–20). In particular, the answer denied that A. J. Leach, Regional Director, Tenth United States Civil Service Region, represents the Civil Service Commission for the purpose of receiving service of process so as to bring the Commission or any of its members within the jurisdiction of the court (R. 17–18). By way of separate defense, the answer reasserted the defenses of improper venue and lack of jurisdiction (R. 17, 19–20). On May 4, 1950, petitioner moved for summary judgment; and on June 6, 1950, respondents filed a countermotion for summary judgment, together with a motion to dismiss which again urged the objections to jurisdiction and venue (R. 4).

After argument, the District Court granted respondents' motion to dismiss, holding that it lacked jurisdiction over the persons of the Civil Service Commissioners who are indispensable

parties but who had not been and could not be subjected to the jurisdiction of the court (R. 23). Petitioner's motion for a new trial (R. 24–25) was denied (R. 4). On appeal, the Court of Appeals affirmed the judgment without prejudice to further proceedings by petitioner in the proper venue (R. 37–40).

SUMMARY OF ARGUMENT

In this action, petitioner seeks to challenge the validity of his dismissal from Federal employment. He prays for a monetary judgment, an order of restoration, and a declaration that he is entitled to be restored to his position and to reimbursement of the pay that he has lost by reason of his discharge. The question here presented is not the validity of the contested administrative action but whether this suit is properly maintainable in the District Court for the Eastern District of Louisiana. Petitioner's argument is twofold: first, that this is a consented suit against the United States and its agencies; second, that, if the suit is against the respondents as individual officers, it is still maintainable in that court.

I

The difficulty with petitioner's contention that this suit is a suit against the United States is that, if it is, it is an unconsented suit. And even if Congressional permission has been given for this type of suit, it is not maintainable in that

court because the Civil Service Commission, an indispensable party, cannot be reached there.

A. As a preliminary matter, we may point out that petitioner cannot obtain review in *any* court of one of the two grounds of attack he makes upon his removal, *i. e.*, the merits of the reason for his discharge. The courts have repeatedly announced that they will not review the merits of discharge from federal employment. The second ground of attack, that compliance was not had with procedural steps prescribed by statute or regulation, is justiciable. In such circumstances, money judgments have been entered against the United States by the Court of Claims, and appropriate relief has been afforded the complainant against the offending public official by the District Court for the District of Columbia. The authority of the District of Columbia court rests upon its special powers and its location at the seat of the Government.

B. In so far as petitioner seeks a money judgment against the United States on the ground of a procedural defect in his removal, the district courts do not have jurisdiction. 28 U. S. C. 1346 (d) (2), as amended on October 31, 1951, expressly provides that (P. L. 248, 82d Cong., 1st Sess.): "The district courts shall not have jurisdiction under this section of: * * * (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers

or employees of the United States." See Brief for the United States in *Bruner* v. *United States*, No. 391, this Term. And since the Declaratory Judgment Act is procedural only and does not enlarge the jurisdiction of the district courts, the district court plainly lacks jurisdiction to enter a declaratory judgment that petitioner is entitled to back pay.

C. Nor has Congress authorized the courts to grant specific non-monetary relief against the United States or its agencies as such, by way of ordering restoration to the job. The suits brought against public officials in the District of Columbia were based on the theory that the defendant officer had acted in excess of his statutory authority in effecting the complainant's removal without following the prescribed procedure, and that the actions were, therefore, *not* unconsented suits against the United States. Congress, which has limited Tucker and Tort Claims Act suits to claims for money only, has made no exception in employment cases and has passed no statute permitting a suit for restoration to be brought against the United States, the employing agency, or the Civil Service Commission, as agencies of the United States. Contrary to petitioner's assertions, the Administrative Procedure Act is not "a sweeping waiver of governmental immunity." Whatever may be the scope of judicial review under Section 10 of the Administrative Procedure Act once agency action is subjected to judicial

scrutiny, there is nothing in that section which indicates that Congress dropped the pre-existing barriers to suits against the United States or its agencies, so as to grant a wholesale consent to suit and review at the instance of any person aggrieved by agency action. If Congress can be said at all to have consented to suits of this nature, it is only as to suits raising such procedural issues which could already be maintained, prior to the Act, against the United States in the Court of Claims or against the individual officer in the District Court for the District of Columbia. But, plainly, Congress did not enlarge the number of forums in which review of such issues might be had. Examination of the precise language of Section 10 and its legislative history demonstrates that Congress did not disturb existing law as to consent-to-suit and did not enlarge the jurisdiction of the district courts.

D. Petitioner cannot prevail even if the court should be convinced that the Administrative Procedure Act (or some other statute) has given the district courts general jurisdiction over job restoration suits brought against federal agencies, rather than merely confirming the existing traditional form of action against individual officers (in the District of Columbia) for actions in excess of authority. Under *Williams* v. *Fanning*, 332 U. S. 490, and earlier cases, it is clear that the Civil Service Commission is an indispensable

party to this suit. The restoratory relief sought here would require the Commission to direct respondent Guerre to restore petitioner to his prior position, and petitioner could not be so restored without action by the Commission. Its concurrence is necessary because Section 14 of the Veterans Preference Act makes the decision of the Commission binding upon the employing agency. Since 28 U. S. C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," and since the official residence of the Commission is in the District of Columbia, venue as to the Commission cannot properly be laid in the Louisiana District Court. Section 10 (b) of the Administrative Procedure Act does not, as its terms and history show, waive that venue requirement. Further, because of the service of process provisions of the Federal Rules of Civil Procedure and the traditional territorial limitations upon the exercise of *in personam* jurisdiction, it is clear that the only court which would have jurisdiction *in personam* over the Commission is the District Court for the District of Columbia.

II

Assuming that this suit is not a suit against the United States but against the respondents as individual officers acting in excess of statutory authority, the suit can be maintained only in the District Court for the District of Columbia. For

substantially the same reasons advanced in Point I, D of this brief (*supra*, pp. 11–12), the suit cannot lie in the Louisiana District Court because the Civil Service Commissioners, who are indispensable parties, cannot be sued in that venue and the court does not have, and cannot obtain, personal jurisdiction over them. Moreover, the Louisiana District Court cannot grant the only relief requested against the individual respondents, *i. e.*, an order of restoration or a declaration that petitioner is entitled to reinstatement. The Declaratory Judgment Act does not enlarge the jurisdiction of the court; it simply provides a new and additional remedy in situations where the court could already grant relief. Accordingly, the Louisiana District Court has the power to grant a declaratory judgment only if it otherwise has jurisdiction to compel compliance with the procedural steps required in order to effect a dismissal from federal employment. Such compliance could be enforced only by an action in the nature of a writ of mandamus. The District Court for the District of Columbia has jurisdiction in an action in the nature of mandamus but all other district courts do not have such jurisdiction. Since an action in the nature of mandamus is a source of jurisdiction rather than a mere remedy, it follows that the district court below could not enter a declaratory judgment in the instant case. Cf. *Marshall* v. *Crotty*, 185 F. 2d 622 (C. A. 1).

III

As a factual matter, it is clear that the respondents did not intend to waive the defenses of improper venue and want of jurisdiction. The record shows that these points were raised at every possible stage. Apart from this factual absence of intent to waive these defenses, it is clear that respondents did not waive them as a matter of law. Rule 12 (b) of the Federal Rules of Civil Procedure expressly provides that objections to venue or jurisdiction may be made by answer or by motion. In this case, it was done by both. Since respondents did not become plaintiffs in the action or invoke the jurisdiction of the court when they moved for summary judgment of dismissal, we submit the court below correctly decided that there had been no waiver.

IV

Since the Louisiana District Court lacked *in personam* jurisdiction over the Civil Service Commissioners, who are indispensable parties, the change of venue provision of 28 U. S. C. 1406 (a) is inapplicable here. Section 1406 (a) is necessarily predicated on the supposition that there are at least two forums in which the defendant is amenable to process. If the Louisiana District Court does not have, and cannot obtain, jurisdiction *in personam* over the Commissioners because of its inability to effectuate proper service of

process, clearly it does not have the power under Section 1406 (a) to confer *in personam* jurisdiction upon another court.

ARGUMENT

In this action, petitioner seeks to challenge the validity of his dismissal from Federal employment. His challenge is predicated, in essence, on two grounds: First, that the decision of the Civil Service Commission, which reversed the findings of the Tenth Regional Civil Service Board and approved the action of the Veterans Administration discharging petitioner in order to promote the efficiency of the service,[1] was not supported by the evidence; second, that the Civil Service Commission and the Veterans Administration did not comply with the procedural steps prescribed by law and regulations. Petitioner asks that the actions of the Civil Service Commission and the Veterans Administration be set aside, and requests a declaration that he is entitled to reinstatement and to reimbursement of the pay that he has lost by reason of his discharge, as well as an order restoring him to his job, and a monetary judgment.

In the present posture of this suit, however, we are not concerned with the validity of the con-

[1] Section 14 of the Veterans Preference Act of 1944 (5 U. S. C. (Supp. IV) 863) provides that no permanent or indefinite preference eligible shall be discharged "except for such cause as will promote the efficiency of the service."

tested administrative action. The only question presented for resolution to this Court is whether this suit is properly maintainable in the District Court for the Eastern District of Louisiana. Two inconsistent strands are twisted throughout petitioner's argument that the courts below erred in holding his action not maintainable. The first is that this is a consented suit against the United States and its agencies, which may be brought in the Louisiana District Court; the second is that, if the suit is against the respondents as individual officers, it is still maintainable in that court. We submit that the judgment below is clearly correct, and that petitioner is wrong on both counts. This is not the type of suit to which the United States has given its consent, and, even if it were, the action could not be brought in Louisiana. And if the suit be considered one against the respondents as individual officers, then it is equally not sustainable there.

I

IF THIS IS A SUIT AGAINST THE UNITED STATES OR ITS AGENCIES, IT CANNOT BE MAINTAINED IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Petitioner's basic argument in answer to the respondents' defenses of improper venue and lack of jurisdiction is that this action is not one against the Civil Service Commissioners themselves but against the Civil Service Commission

as an entity and agency of the United States—that, to all intents and purposes, this is a proceeding against the United States for which consent has been given. Petitioner correctly points out that whether a suit is, in effect, a suit against the sovereign rather than against public officials does not depend on whether the sovereign has been expressly named a party defendant. *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, 687. Since the United States is ubiquitous (cf. *Hoiness* v. *United States*, 335 U. S. 297), petitioner contends that venue may be laid in any district court of competent jurisdiction.

The prime difficulty with this contention is that, if this be a suit against the United States, it is an unconsented suit and therefore beyond the jurisdiction of the Louisiana District Court.

Petitioner's prayer for relief is that the court grant petitioner a judgment "declaring plaintiff's rights * * * particularly that plaintiff is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position from January 2, 1947 to the date of the payment thereof * * *." (R. 15). In this Court, he has expanded this request for relief to include "a monetary judgment against the United

States" (Pet., p. 16). It would appear, therefore, that he seeks (i) an order restoring him to his job, (ii) a judgment for back pay, or (iii) a declaratory judgment that he was wrongfully discharged and is entitled to back pay and restoration. Congress has not consented to any such relief against the United States or its agencies in the district courts, and petitioner's suit, if it be against the United States or its agencies, must therefore fall as an unconsented suit against the United States. And even if Congressional permission has been given for this type of suit, it is not maintainable in that court because the Civil Service Commission cannot be reached there.

A. DISMISSALS OF FEDERAL EMPLOYEES ARE REVIEWABLE ONLY FOR DEFECTS IN THE PROCEDURE OF DISMISSAL

As a preliminary matter, we may point out that petitioner cannot obtain review in *any* court of one of the two grounds of attack he makes upon his removal. As previously noted, petitioner raises essentially two issues with respect to the validity of his removal: (1) the merits of the reasons for his discharge; (2) the legality of the procedure followed in effecting his discharge. The first issue is not justiciable. The courts have repeatedly announced that the judiciary possesses no general supervisory power over the tenure, selection, or removal of public officers and employees, that the interference of the courts with

the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and that the courts will not review the merits of discharges from federal employment. *Eberlein* v. *United States,* 257 U. S. 82; *Burnap* v. *United States,* 252 U. S. 512; *Brown* v. *Lane,* 232 U. S. 598; *Reagan* v. *United States,* 182 U. S. 419; *Keim* v. *United States,* 177 U. S. 290; *White v. Berry,* 171 U. S. 366; *Crenshaw* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Matter of Hennen,* 13 Peters 230; *United States* v. *Guthrie,* 17 How. 284.[2] As the cases just cited reveal, that conclu-

[2] See also, to the same effect, *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.); *Levy* v. *Woods,* 171 F. 2d 145 (C. A. D. C.); *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind* v. *Morgenthau,* 152 F. 2d 286 (C. A. D. C.); *Maghan* v. *Board of Commissioners of the District of Columbia,* 141 F. 2d 274 (C. A. D. C.); *Hammond* v. *Hull,* 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *Levine* v. *Farley,* 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lamp,* 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Sinton,* 269 Fed. 715 (C. A. D. C.); *United States ex rel. Nalle* v. *Hoover,* 31 App. D. C. 311; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett,* 85 Fed. 38 (C. C. D. N. J); *Morgan* v. *Nunn,* 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl,* 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon,* 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal,* 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell,* 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman,* 26 F. Supp. 105 (D. Minn.); *Love* v. *United States,* 98 F. Supp. 770 (C. Cls.), certiorari denied,

sion has been reached both where suit was brought in the Court of Claims against the United States *eo nomine* and where suit was brought in the district courts against the public official whose action was challenged.

The courts have intervened, however, to provide judicial relief where the discharge was contested on the ground that compliance was not had with the procedural steps prescribed by statute or regulation. In such circumstances, money judgments have been entered against the United States by the Court of Claims, and appropriate relief has been afforded the complainant against the offending public official by the District Court for the District of Columbia. *E. g., United States* v. *Wickersham,* 201 U. S. 390; *United States* v. *Elchibegoff,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694; *Wittner* v. *United States,* 110 C. Cls. 231; *Borak* v. *Biddle,* 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Deak* v. *Pace,* 185 F. 2d 997 (C. A. D. C.); see also *Levine* v. *Farley,* 107 F. 2d 186, 190, and cases there cited (C. A. D. C.), certiorari denied, 308 U. S. 622. The authority of

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342 U. S. 866; *Gadsden* v. *United States,* 111 C. Cls. 487; *Weinstein* v. *United States,* 109 C. Cls. 579; *Culligan* v. *United States,* 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States,* 105 C. Cls. 280; *Bratton* v. *United States,* 90 C. Cls. 604; *Bennett* v. *United States,* 89 C. Cls. 322; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States,* 55 C. Cls. 174; *Lellmann* v. *United States,* 37 C. Cls. 128.

the District of Columbia court rests on its special powers and its location at the seat of the Government. *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524. See *infra*, pp. 60 *et seq.*)

B. UNDER 28 U. S. C. 1346 (d) (2), THE DISTRICT COURT HAS NO JURISDICTION OVER A SUIT FOR BACK PAY

Insofar as petitioner seeks a money judgment against the United States on the ground of a procedural defect in his removal, the Court of Claims undoubtedly has jurisdiction to grant that relief (*supra*, p. 20).[3] But a discharged employee cannot sue the United States for back pay in the district courts, even though he bases his claim on the ground that the proper procedure was not followed in discharging him. 28 U. S. C. 1346 (d) (2), as amended on October 31, 1951, expressly provides that (P. L. 248, 82d Cong., 1st Sess.): "The district courts shall not have jurisdiction under this section of: * * * (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States."

At the time this action was instituted, Section 1346 (d) (2) read as follows: "The district courts

[3] It should be noted, however, that the Court of Claims does not have the power to grant a declaratory judgment. See *Twin Cities Properties* v. *United States*, 81 C. Cls. 655.

shall not have jurisdiction under this section of: * * * (2) Any civil action to recover fees, salary, or compensation for official services of *officers* of the United States." [Emphasis added.] As shown in the Brief for the United States in *Bruner* v. *United States*, No. 391, this Term, pp. 20–34, the term "officer" was not employed in the sense of a "constitutional officer" but was generally descriptive of all regular employees of the United States, and, in any case, all civil service employees appointed by authority of the head of the department are inferior officers in the constitutional sense. Moreover, as the Brief for the United States in the *Bruner* case demonstrates (pp. 8–18), the amendment of Section 1346 (d) (2) by P. L. 248 would have the effect of ousting the district courts of any jurisdiction they might have had in pending cases, assuming that the original form of Section 1346 (d) (2) related only to constitutional officers, and that petitioner was not an inferior constitutional officer.[4]

[4] Although we think it irrelevant, for these reasons, whether petitioner occupied the position of an "officer" or "employee," it should be noted that petitioner errs in stating that the complaint alleges that he was an "employee" and that the respondents admitted this fact in its answer (Supp. Br., p. 4). Petitioner cites in support of this assertion paragraphs 1 and 5 of the complaint, which appear at pages 6 and 7 of the record. Paragraph 1 alleges, with respect to petitioner's position, only that he "had completed a probationary or trial period employed in the Civil Service in the Veterans Administration, Regional Office, No. 3021, P & S Classification No. 4 at a basic salary of $5,152.80 per annum." And paragraph 5 refers only to "his suspension without pay from his said position with the Veterans Administration on January 2, 1947 * * *."

And since the Declaratory Judgment Act (28 U. S. C. 2201–2202) is procedural only and does not enlarge the jurisdiction of the district courts, the district court below plainly lacks jurisdiction to enter a declaratory judgment that petitioner is entitled to the pay he has lost by reason of his separation from federal employment. *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C. A. D. C.), certiorari denied, 326 U. S. 686; *Almour* v. *Pace*, Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); cf. *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *Love* v. *United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673; *Yeskel* v. *United States*, 31 F. Supp. 956 (D. N. J.); see also *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, 689, fn. 9. (For a further discussion of the declaratory judgment aspects of this case, see *infra* pp. 57 *et seq.*).[*]

C. THE DISTRICT COURT HAS NO JURISDICTION TO ORDER PETITIONER RESTORED TO HIS JOB OR TO DECLARE HIM ENTITLED TO RESTORATION

Nor has Congress authorized the courts to grant specific non-monetary relief against the

[*] If this suit purports to be a suit against the United States under the Tucker Act (Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. 1346), it should also be observed that it cannot lie for the additional reason that the United States has been improperly joined as a party defendant with the Civil Service Commission and respondent Guerre. *United States* v. *Sherwood*, 312 U. S. 584; *Love* v. *Royall*, 179 F. 2d 5 (C. A. 8); *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *New Amsterdam Cas. Co.* v. *United States*, 71 F. Supp. 155 (W. D. Pa.).

United States or its agencies as such, by way of ordering restoration to the job. The suits brought against public officials in the District Court for the District of Columbia (referred to above, pp. 20–21) were based on the theory that the defendant officer had acted in excess of his statutory authority in effecting the complainant's removal without following the prescribed procedure, and that the actions were, therefore, *not* unconsented suits against the United States. See *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, at 689–690. These decisions are proof, in themselves, that the United States and its non-suable agencies cannot be sued for restoratory relief. *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4), expressly so holds. Cf. *Marshall* v. *Crotty*, 185 F. 2d 622, 628, fn. 3 (C. A. 1).

Congress, which has limited Tucker and Tort Claims Act suits to claims for money only, has made no exception in employment cases and has passed no statute permitting a suit for restoration to be brought against United States, or the employing agency, or the Civil Service Commission, as agencies of the United States. The Veterans Preference Act of 1944 and the Lloyd-Lafollette Act of 1912* certainly do not contain

* Petitioner apparently suggests that the amendment of Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555) by the Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652 (b) (2), expresses Congressional consent to such suits (Pet. p. 14). This assertion is entirely without merit. Section 6 (b) (2) of the Lloyd-LaFollette Act as

even a suggestion of consent-to-suit,[7] and the Declaratory Judgment Act has been authoritatively held not to have repealed, modified, or enlarged the jurisdiction of the federal courts (see *supra*, p. 23, *infra*, pp. 57–59, 64–69).

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amended (5 U. S. C. 652 (b) (2)) reveals on its face that it is not concerned with suits by civil service employees to obtain reinstatement. It provides only that an employee who has been restored or reinstated to duty after appropriate *administrative* action shall be reimbursed the pay he has lost by reason of his unjustified discharge, suspension, or furlough. The plain language of the amendment is fully supported by the pertinent Congressional documents which show that the amendment was intended to change the existing law which prevented the Government's accounting officers from paying a reinstated employee the compensation he had lost. See H. Rept. Nos. 1436, 2011, 80th Cong., 2d Sess.; S. Rept. No. 414, 80th Cong., 1st Sess. In any event the amendment is no more than a waiver of consent to be sued for a money judgment and not for reinstatement. As pointed out above (pp. 21–23), such a suit would lie only in the Court of Claims.

[7] Where Congress has conferred jurisdiction upon the district courts to entertain suits against the Civil Service Commission, as an entity and agency of the United States, it has done so expressly. See Sec. 12 (c) of the Hatch Act of August 2, 1939, 53 Stat. 1147, as amended, 54 Stat. 767, 5 U. S. C. (Supp. IV) 118 k (c); cf. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127. Parenthetically, it may be noted that Section 12 (c) of the Hatch Act specifically deals with the problem of venue, providing that "any party aggrieved by any determination or order of the Commission under subsection (b) may * * * institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides * * *." In this connection, it should also be pointed out that the holding in *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4) upon which petitioner relies (Pet. pp. 11–13), that the Federal Housing Administration may be sued in any court of

THE ADMINISTRATIVE PROCEDURE ACT. In arguing that the United States has consented to suit, petitioner places primary emphasis on the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*), urging that Section 10 thereof (5 U. S. C. 1009) is a "sweeping waiver of governmental immunity." (Pet., p. 15). Until now, this contention appears to have been expressly passed upon only by the Court of Appeals for the District of Columbia Circuit and has been summarily rejected by that court as wanting in substance. *Almour* v. *Pace,* Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); *Aktiebolaget Bofors* v. *United States,* Pike & Fischer Ad. Law (2d), p. 698 (C. A. D. C.). That conclusion is clearly correct. The construction advanced by petitioner perverts both the language of the Act and its legislative history.[8]

The statutory language. Whatever may be the scope of judicial review under Section 10 once agency action is subjected to judicial scrutiny (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474; *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504), there is

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competent jurisdiction, is based on a specific provision in the National Housing Act, 49 Stat. 722, 12 U. S. C. 1702, which declares that the Federal Housing Administrator may "sue and be sued in any court of competent jurisdiction, State or Federal."

[8] The general legislative history of the Act is collected in S. Doc. 248, 79th Cong., 2d Sess. For convenience, that document will hereafter be referred to as S. Doc. 248.

nothing in that section which indicates that Congress dropped the pre-existing barriers to suits against the United States or its agencies, so as to grant a wholesale consent to suit and review at the instance of any person aggrieved by agency action. On the contrary, by the section's introductory clause Congress dovetailed judicial review under Section 10 to the manifold operations of the many agencies performing diverse functions under varying statutes. This opening clause, which governs the whole of the section, provides:—"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Significantly, these exceptions are applicable not only where some other statute or rule of law forbids judicial review altogether or makes agency discretion absolute, but also "so far as"—the extent to which—Congress or substantive rules of law forbid review. It is also significant that Section 10 does not require that the statutory preclusion of judicial review be express; the word "express", as contained in an earlier draft of the bill, was eliminated by the Senate Committee. Compare S. 7, 79th Cong., 1st Sess., as introduced in January 1945, with the bill as reported in S. Rep. No. 752, 79th Cong., Sen. Doc. 248, p. 36; see also Sen. Doc. 248, pp. 229–230, 413.[9]

[9] *Ludecke* v. *Watkins*, 335 U. S. 160, 163–4, is an example of a statute precluding judicial review, though not in express terms. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

The bearing of the introductory clause on the instant case is this: As we have shown above (pp. 18–21), a Federal civil service employee alleging unlawful removal from employment is entitled to judicial review only on the question whether the applicable procedures were followed. To that extent, the statutes do not preclude judicial review and removal action is not committed to agency discretion. Conversely, all other questions, including the merits of the dismissal, are committed to agency discretion and judicial review is precluded. In short, the introductory clause of Section 10 continues to limit judicial review in this area to the question of whether the proper procedure was followed. See *Attorney General's Manual on the Administrative Procedure Act* (1945), p. 95. If Congress can be said at all to have consented to suit in the Administrative Procedure Act, it is only as to suits raising such procedural issues—a "traditional form of action" (see *infra*, p. 35)—which could already be maintained, prior to the Act, against the United States in the Court of Claims or against the individual officer in the District Court for the District of Columbia. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 80–82.[10]

[10] Section 1 (a) of the Act defines "agency" as "each authority" of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia (5 U. S. C.

Can it be said, however, that Section 10 somehow consents to suit in a district court other than the District of Columbia court, so as to enlarge the jurisdiction of all other federal district courts? Nothing in the section speaks in such terms of granting or modifying existing jurisdiction or of consent-to-suit. Indeed, the section assumes on its face that jurisdiction is granted by other legislation. Section 10 (b) declares that, in the absence or inadequacy of a special statutory review proceeding, review of reviewable agency action may be had by "any applicable form of legal action * * * *in any court of competent jurisdiction*" (emphasis supplied). This reference to a "court of competent jurisdiction" can mean only a court deriving its jurisdiction from some other statute and otherwise competent. Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622, 627. Neither subsection (b) nor any other part of Section 10 purports to confer any new jurisdiction on the district courts.[11] Moreover, the introductory phrase—"except so far as (1) statutes preclude judicial review"—modifies subsection (b), as well as the rest of Section 10, and would continue to bar suit in district courts outside the District of Columbia

(Supp. IV) 1001 (a)). The word "authority" is used as meaning officers, boards or commissions. See S. Doc. No. 248, pp. 196, 253, 354.

[11] On the non-effect of Section 10 (b) on *venue* of suits against officials, see *infra*, pp. 44–47.

since the jurisdictional provisions of Title 28 of the Code preclude judicial review in those courts.[12] *Supra*, pp. 18–25; *infra*, pp. 57–68. Certainly, the least that can be said is that one cannot spell out of Section 10 the express conferring of consent to sue the United States or its agencies which has always been required: Cf. *United States* v. *Shaw*, 309 U. S. 495, 500–1. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656, 659.

Since the passage of the Administrative Procedure Act in June 1946, Congress has not acted as if that statute had constituted "a sweeping waiver", as petitioner urges. If this had been so, it would hardly have been necessary to spell out in detail only two years later, in the revision of the Judicial Code in 1948, the limited class of cases in which the United States *eo nomine* might be sued in the district courts. See 28 U. S. C. 1346. Nor is the concept of "a sweeping waiver" of immunity consonant with the express limitations provided in Section 1346 upon the jurisdiction of those courts. Thus, in civil actions not sounding in tort or arising under the internal-revenue laws,

[12] That Section 10 was not intended to amend the substantive law with regard to sovereign immunity is further substantiated by subsection (c) which states, subject to the introductory proviso quoted above, that "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." As pointed out *supra*, pp. 20–21, a discharged federal employee does have an adequate remedy in the Court of Claims and the District Court for the District of Columbia.

the claim asserted may not exceed $10,000 (28 U. S. C. 1346 (a) (2)). Further, the district courts are denied jurisdiction under that section of "(1) Any civil action or claim for a pension; (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States." (28 U. S. C. 1346 (d) (1) and (2), as amended by P. L. No. 248, October 31, 1951). Since Section 1346 is merely a consolidation of provisions existing at the time of the passage of the Administrative Procedure Act (see Reviser's Note following 28 U. S. C. 1346), it is a necessary inference from their reenactment in 1948 that Congress did not believe that the Administrative Procedure Act had amended the substantive law respecting sovereign immunity so as to confer general consent to sue throughout the country. And it is most unlikely that Congress would recently have made it unmistakably clear that all federal salary suits, including actions by dismissed employees, must be brought in the Court of Claims (see *supra*, pp. 21–22), if it had been of the view that suits for job restoration could be brought in the various district courts.

The legislative history. The legislative history of Section 10 confirms (a) that full effect should be given to the introductory clause, and (b) that Congress was not concerned with conferring con-

sent-to-suit or enlarging the jurisdiction of the district courts.

The history of this section of the Act has been set forth in some detail in the Government's briefs in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, October Term, 1950, pp. 59–68, and *McGrath* v. *Kristensen*, No. 34, October Term, 1950, pp. 41–48, 50–52, and is summarized by the Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 478–487; cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–41. In this brief, we shall merely recapitulate for the Court's convenience the stress that was laid, by practically all participants, on not disturbing existing rules "for or against judicial review", and on the absence of any consideration of the jurisdictional problems flowing from sovereign immunity.

The influential minority of the Attorney General's Committee on Administrative Procedure drafted as part of their recommendations a section on judicial review which is the ancestor of Section 10 of the Administrative Procedure Act. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 245–246. However, the minority of the Committee made it clear that "The situation should be clarified by a statement of legislative policy in no uncertain terms, but at the same time it is unnecessary to go beyond certain simple and recognized prin-

ciples which have long obtained. The several provisions of this section are designed merely to state a policy * * * without disturbing existing express statutory provisions for or against judicial review." *Report*, p. 245. And they emphasized their position by providing in their proposed section on judicial review that "all statutory provisions specifically precluding judicial review * * * shall remain valid and binding." *Report*, p. 246.

The minority views as to judicial review, which are largely embodied in Section 10 of the Act, were at all times described by their proponents as a statement of general principles which was not intended to provide a rigid procedure for judicial review applicable to all agencies.[13]

In the 1945 hearings before the House Judiciary Committee, the aims of the proponents of this measure were described even more specifically by Mr. Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law (S. Doc. No. 248, pp. 83–84):[14]

[13] The majority and minority members also made similar statements in testifying before the Senate Judiciary Committee in 1941. See *Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 77th Cong., 1st Sess., on S. 674, S. 675, and S. 918* (1941), at pp. 838, 845, 849, 850, 1350–1359, and 1400.

[14] Mr. McFarland was one of the minority group on the Attorney General's Committee.

> We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; *but we do not believe the principle of review or the extent of review can or should be greatly altered.* We think that the *basic exception of administrative discretion should be preserved—must be preserved.* We believe that about all the statute should or could do would be to state the form of action, *the type of acts that are reviewable in accordance with the present law,* the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is. [Emphasis supplied.]

With reference to the introductory proviso of Section 10, the Report on the bill by the Senate Committee on the Judiciary (S. Rep. 752, 79th Cong., 1st Sess.) comments that "The basic exception of matters committed to agency discretion would apply even if not stated at the outset." S. Doc. No. 248, p. 212. Similarly, the House Committee on the Judiciary pointed out in its Report, with respect to Section 10 (H. Rept. No. 1980, 79th Cong., 2d Sess.) that "Matters of discretion are necessarily exempted from the section * * * Where laws

are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers." S. Doc. No. 248, p. 275.

Comparable expressions by the chief legislative supporters of the legislation buttress the conviction that Section 10 of the Adminfstrative Procedure Act was not intended to extend the occasions for judicial review or to widen the jurisdiction of the federal courts to hear cases against the Government. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment (S. Doc. 248, p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. *It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provisions for judicial review.* [Emphasis supplied.]

And most pertinently, Senator McCarran, Chairman of the Senate Judiciary Committee, stated (S. Doc. 248, p. 311):

> Substantive law, enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.[15]

The Attorney General previously had made similar explicit statements to the effect that Section 10 of the Act did not go beyond existing law subjecting governmental action to review, in letters to the Chairman of the Senate[16] and

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[15] The Senate Judiciary Committee's Print of June 1945, likewise indicated that Section 10 of the Administrative Procedure Act was not designed to supplant existing modes of judicial review, and that "the recognition of these so-called common-law types of review is in accord with the authoritative statement of existing law." S. Doc. 248, p. 37.

[16] "This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda and Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C. C. A. 2d), certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable." S. Doc. No. 248, pp. 229-230.

House [17] Judiciary Committees, furnished at their request. The Attorney General's letter and comprehensive analysis were appended to and made part of the final report on this bill by the Senate Judiciary Committee.[18]

This history certainly underscores the Congressional purpose, reflected on the face of the Act, not to add to "the type of acts that are reviewable in accordance with the present law". And unlike the question of the scope of review, the history shows that there was little or no Congressional concern over agency action which was reviewable only in a designated forum; there was certainly no trend toward enlarging the number of courts in which review might be had. On the contrary, Congress made it quite clear that existing venue provisions were not altered. See *infra*, pp. 44–47. A legislative background of this type does not permit of even a shadowy inference that the jurisdiction of all the district courts was *sub silentio* broadened to include consented suits against the United States, or its agencies, for job restoration.

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[17] "It [the proposed legislation] also restates the law governing judicial review of administrative action." S. Doc. 248, p. 407. See also pp. 413, 415.

[18] S. Doc. 248, p. 223, et seq. In another connection, this Court found that such use of a letter from the Attorney General served, "in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect" of the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

D. EVEN IF CONGRESS HAS GIVEN CONSENT TO THE MAINTENANCE IN THE DISTRICT COURTS OF SUITS FOR JOB RESTORATION BROUGHT AGAINST FEDERAL AGENCIES AS SUCH, PETITIONER'S SUIT MUST FAIL BECAUSE THE CIVIL SERVICE COMMISSION IS AN INDISPENSABLE PARTY WHICH CANNOT BE SUED IN THE EASTERN DISTRICT OF LOUISIANA

Petitioner cannot prevail even if the Court should be convinced that the Administrative Procedure Act (or some other statute) has given the district courts general jurisdiction over job restoration suits brought against federal agencies, rather than merely confirming the existing traditional form of action against individual officers (in the District of Columbia) for actions in excess of authority. For the Civil Service Commission is an indispensable party and it cannot be sued in the Louisiana District Court. It cannot be reached there because the venue is improper, and because personal jurisdiction was not obtained over it.

1. *The Commission is an indispensable party.*— It would appear from petitioner's complaint and the arguments advanced by him that petitioner considers the Commission to be an indispensable party.[19] To begin with, the Commission was named a party defendant and service of process was at-

[19] Thus, petitioner argues only "in the alternative" that the Commission is not an indispensable party because the District Court "could surely have rendered judgment against the United States Government for the monetary amount determined to be due him without the Civil Service Commission being a party to the action." (Pet. p. 17). But as we have already shown (pp. 21–23), the District Court has no jurisdiction to enter a money judgment in favor of an officer or employee of the United States for fees, salary, or compensation.

tempted to be made on the Commission (*supra*, p. 5). Second, the substance of petitioner's complaint is that the Commission reversed the findings of its Regional Board and approved the action of the Veterans Administration removing him from his position. Finally, petitioner's primary prayer for relief is that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration." (R. 15).

The purpose of this suit, therefore, is to control the action of the Commission. Petitioner challenges that action and seeks relief against it because the decision of the Commission reversing the decision of its Regional Board and affirming the action of the Veterans Administration is binding upon the Veterans Administration. Section 14 of the Veterans Preference Act of 1944, upon which petitioner bases his claim of an unlawful discharge, expressly provides that (5 U. S. C. (Supp. IV) 863) "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends." Cf. Sec. 19 of the Veterans Preference Act of 1944, 5 U. S. C. (Supp. IV) 868; see also 5 CFR 1949 ed. 22.11 (f).

In the circumstances, this Court's pronouncements in *Warner Valley Stock Co.* v. *Smith*, 165

U. S. 28; *Gnerich* v. *Rutter*, 265 U. S. 388; and *Webster* v. *Fall*, 266 U. S. 507, compel the conclusion that the Commission is an indispensable party. As the Court pointed out in *Williams* v. *Fanning*, 332 U. S. 490, 493, "these cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." Unlike the relief sought in *Williams* v. *Fanning*, *supra*, which would not require the Postmaster General "to take *new* action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case" [emphasis added] (*id.* at 494), the relief sought here would require new action by the Commission directly. We submit, therefore, that the Commission is an indispensable party to this suit, even if it be assumed that some consent to suit has been granted by Congress in job restoration cases. The courts have so held in comparable cases in which the relief prayed for required action by a superior officer. *Money* v. *Wallin*, 186 F. 2d 411 (C. A. 3), certiorari denied, 341 U. S. 935; *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908; *McGrimley* v. *Foley*, 89 F. Supp. 10 (D. Mass.), affirmed, 180 F. 2d 1022 (C. A. 1); cf. *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4),

certiorari denied, 339 U. S. 949; *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. A. 4); *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Kohlman* v. *Smith*, 71 F. Supp. 73 (W. D. Pa.).

2. *The Eastern District of Louisiana is an improper venue for the Commission.*—Since 28 U. S. C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," it follows that venue was improperly laid in the District Court for the Eastern District of Louisiana if the official situs of the Commission is not in that district. That it is not there located would not seem to be open to question. Although the statute providing for the creation of the Commission does not fix its situs, is is common knowledge that the central office of the Commission is in Washington, D. C. See Congressional Directory, 82d Cong., 1st Sess., p. 448; United States Government Organization Manual 1951–1952, p. 472; Sections 22.11, 23.16 of the Rules of the Commission, 5 CFR 1949 ed. 22.11, 23.16. We believe the Court can take judicial notice, as did the court below (R. 38), "that the Commission's official situs and legal domicile is in the District of Columbia, where its plenary powers are exercised, though many of its subordinate and ministerial functions are necessarily carried out locally by regional officials who act, not by virtue

of their own authority, but solely under the control and direction of the Commission."*

In comparable suits against Government officials, the courts have uniformly announced that the official residence of the heads of the executive departments and agencies, and of the agencies themselves, is in the District of Columbia. *Butterworth* v. *Hill*, 114 U. S. 128 (Comm'r of Pat-

* Petitioner urges that the Commission does reside in New Orleans because it has a substantial staff there which performs numerous specific duties delegated to them by the Commission. Petitioner asserts that the Regional Director of the New Orleans office is also "in practice the general manager of the Commission in this district * * * [and, therefore,] that the Regional Director is included within the term 'Civil Service Commission' as expressly defined by Sec. 17 of the Veterans Preference Act, 5 U. S. C. A. 866." Petitioner concludes, therefore, that the Commission is present and functioning in that jurisdiction and that the service upon the Regional Director in New Orleans was effective service upon the Commission. (Pet. pp. 7–8). This argument is specious. The fact that some of the subordinate and ministerial functions of the Commission are necessarily carried out locally by regional officials and employees who act solely under the control and direction of the Commission patently does not change the official situs of the Commission for the purposes of venue.

Petitioner's further argument that such officials and employees are the Commission within the meaning of Section 17 of the Veterans Preference Act completely distorts the meaning and intent of that section, which, on its face, merely provides for succession in office by reason of subsequent legislation or reorganization on the part of the President. It is manifest from Section 1 of the Act of January 16, 1883, 22 Stat. 403, as amended, 5 U. S. C. 632, that there are but three Civil Service Commissioners and that the "said three Commissioners shall constitute the United States Civil Service Commission." See also 1949 Reorganization Plan No. 5, 14 F. R. 5227, 63 Stat. 1067.

ents); *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4) (Postmaster General); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3) (Comm'r of Immigration & Naturalization); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4); certiorari denied, 339 U. S. 949 (Housing Expediter); *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2) (Comm'r of Immigration & Naturalization); *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793 (C. A. 5) (Sec'y. of Agriculture); *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908 (Sec'y. of Navy).[21]

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[21] To the same effect see *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.) (U. S. Surgeon General); *Stamatiou* v. *Miller*, 88 F. Supp. 556 (E. D. Pa.) (Comm'r of Immigration & Naturalization); *Isthmian S. S. Co.* v. *LeBaron*, 72 F. Supp. 223 (S. D. N. Y.) (National Labor Relations Board); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.) (Price Administrator); *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225 (D. Mass.) (NLRB); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.) (Price Administrator); *Wisconsin Restaurant Ass'n* v. *Porter*, 68 F. Supp. 239 (E. D. Wis.) (Price Administrator); *Tribal Council of Blackfeet Indian Reservation, Mont.* v. *Ickes*, 58 F. Supp. 584 (D. Mont.) (Sec'y. of Interior); *Hartmann* v. *Federal Reserve Bank*, 55 F. Supp. 801 (E. D. Pa.) (Sec'y. of Treasury); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.) (Postmaster General); *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.) (Postmaster General); *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.). (Postmaster General); *Juell* v. *Commissioner of Immigration and Naturalization*, 37 F. Supp. 533 (E. D. N. Y.), modified on other ground 121 F. 2d 728 (C. A. 2) (Comm'r of Immigration & Naturalization); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4) (Comm'r of Patents); *Kentucky Nat-*

Since this action must be brought "in the judicial district where all defendants reside" (28 U. S. C. 1391 (b)), venue can properly be laid only in the District Court for the District of Columbia where the Commission resides, and the courts have so held in similar cases. Cf. *Butterworth* v. *Hill, supra; Podvinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).[22]

Petitioner contends, however, that 28 U. S. C. 1391 (b) is inapplicable here because of Section

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ural Gas Corp. v. *Public Service Commission of Kentucky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6) (Federal Power Commission); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.) (NLRB); *Nesbitt Fruit Products Inc.* v. *Wallace*, 17 F. Supp. 141 (S. D. Iowa) (Sec'y. of Agriculture); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.) (Veterans' Administrator).

[22] To the same effect see *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Stamatiou* v. *Miller*, 88 F. Supp. 556 (E. D. Pa.); *Isthmian S. S. Co.* v. *LeBaron*, 72 F. Supp. 223 (S. D. N. Y.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *Wisconsin Restaurant Ass'n* v. *Porter*, 68 F. Supp. 239 (E. D. Wis.); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.); *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.); *Kentucky Natural Gas Corp.* v. *Public Service Commission of Kentycky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Nesbitt Fruit Products Inc.* v. *Wallace*, 17 F. Supp. 141 (S. D. Iowa); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4).

10 (b) of the Administrative Procedure Act (5 U. S. C. 1009 (b)), which provides that judicial review may be had "in any court of competent jurisdiction." Concededly, if that phrase be read out of context, it might be construed as an unrestricted choice of venue. Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. Placed in its proper setting, however, the phrase cannot be so read. In its entirety, Section 10 (b) states as follows:

> The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Thus, in providing for review "in any court specified by statute" or in the absence or inadequacy thereof "in any court of competent jurisdiction," Section 10 (b) does not waive venue requirements but incorporates existing law as to venue.

This reading is substantiated by the Report of House Committee on the Judiciary (H. Rept.

No. 1980, 79th Cong., 2d Sess.) which expressly declared that "The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 276). Similarly, Representative Walter stated during the course of his explanation of the bill to the House that "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 369).[23] We

[23] These Congressional comments take on added significance when the language of Section 10 (b) is contrasted with that contained in other bills introduced in the 79th Congress. Sharply differing from Section 10 (b) of the Act, H. R. 339 proposed in Section 9 (c) thereof that "The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district, and division where the party seeking court review * * * resides * * *." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 145). Section 9 (c) of H. R. 1117 contained substantially the same language (S. Doc. No. 248, 79th Cong., 2d Sess., p. 153). And Section 310 (c) of H. R. 1206 stated with respect to "Courts and Venue" that "Whenever a court shall hold that it is without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for doing, to such court of compe-

submit, therefore, that the phrase "in any court of competent jurisdiction" in Section 10 (b) must be construed as incorporating the provisions of 28 U. S. C. 1391 (b).[24]

3. *Jurisdiction in personam was not obtained over the Commission.*—Moreover, the Louisiana District Court does not have personal jurisdiction over the Civil Service Commission. Petitioner concedes that the issue of proper service must be determined by reference to the Federal Rules of Civil Procedure (Pet., pp. 10–11). Cf. *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Eng Kam* v. *McGrath*, 10 F. R. D. 135 (W. D. Wash.). Those requirements have not been fulfilled here.

Petitioner attempted to serve the Commission in two ways: (i) by registered mail to the Commission in Washington, D. C.; and (ii) by personal service on A. J. Leach, Regional Director of the Tenth Civil Service Region in New Orleans, Louisiana (R. 2, 3). Service was not properly effectuated by either device.

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tent jurisdiction as may be designated by the applicant * * *" (S. Doc. No. 248, 79th Cong., 2d Sess., p. 176).

[24] Petitioner's reliance on *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4), is misplaced (Pet. pp. 11–13). The language of the National Housing Act, 49 Stat. 722, 12 U. S. C. 1702, providing that the Federal Housing Administrator may "sue and be sued in any court of competent jurisdiction, State or Federal," necessarily waived venue by permitting suits in the State as well as the Federal courts. Of course, suits under that Act against the Administrator are, plainly, consented suits against the United States. Cf. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5.

Rule 4 (d) (5) of the Federal Rules of Civil Procedure provides for service "Upon an officer or agency of the United States, by serving the United States and by *delivering* a copy of the summons and of the complaint to such officer or agency. * * *" [Emphasis added]. *Infra*, p. 79. Since the sending of a copy of the summons and of the complaint by registered mail is obviously not the "delivering" of such copies,[22] petitioner's attempt to serve the Commission clearly did not comply with Rule 4 (d) (5). Accordingly, the district court did not acquire jurisdiction *in personam* by such attempted service.

This conclusion is reinforced by Rule 4 (f) which provides that "All process other than a subpoena" may be served only "within the territorial limits of the state in which the district court is held" unless a statute of the United States otherwise provides. *Infra*,

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[22] That service by registered mail is not "delivery" is manifest from Rule 4 (d) (4) which provides for service "Upon the United States, by *delivering* a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought * * * and by *sending* a copy of the summons and of the complaint by registered mail to the Attorney General, * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also *sending* a copy of the summons and of the complaint by registered mail to the Attorney General * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also *sending* a copy of the summons and of the complaint by registered mail to such officer or agency." [Emphasis added.]

p. 80. Since service by mail upon the Commission in Washington, D. C., was service outside the territorial limits of Louisiana, and no statute of the United States provides for service, in cases such as the one at bar, anywhere in the United States,[26] such attempted service was invalid under Rule 4 (f) as well as under Rule 4 (d) (5). Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Munter* v. *Weil Corset Co.*, 261 U. S. 276; *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2); *Love* v. *Royalt*, 179 F. 2d 5 (C. A. 8); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4), certiorari denied, 339 U. S. 949; *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. A. 5), certiorari denied, 325 U. S. 883; *Blank* v. *Bitker*, 135 F. 2d 962 (C. A. 7); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4)—all holding that process cannot run outside the court's jurisdiction.

Petitioner apparently concedes that service by registered mail was improper service, stating that the question of service is "namely, whether the service effected on the Civil Service Commission

[26] If, as we have just shown (pp. 44-47), Section 10 (b) of the Administrative Procedure Act has not changed the venue provision applicable to this case (*i. e.* 28 U. S. C. 1391 (b)), it certainly did not change these requirements as to personal jurisdiction. As was said in *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627, "It is not lightly to be assumed that Congress intended to depart from a long established policy" requiring service of process to be within the district.

through its Regional Manager in New Orleans was proper service on the Commission." (Pet. p. 10). Petitioner argues that physical delivery of the summons and complaint to A. J. Leach, the Regional Director, was substantial compliance with the requirements of Rule 4 (d) (5). (Pet. p. 11). Assuming *arguendo*, as we do in this Point I, D, that a district court could have jurisdiction over an agency of the United States in this type of suit, delivery to the Regional Director of the Commission is still not sufficient compliance with the requirements of Rule 4 (d) (5) that there be physical delivery of the summons and complaint to the "agency."[27] Service upon a subordinate official of an agency could constitute proper service only if that official were authorized specifically by appointment or by law

[27] It should be observed that an agency of the United States may be deemed to be the United States for some purposes and a separate entity for other purposes. *E. g.*, see *United States* v. *Interstate Commerce Commission*, 337 U. S. 426; compare *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, with *Cherry Cotton Mills, Inc.* v. *United States*, 327 U. S. 536. Further, agencies of the United States may have conflicting interests in the same law suit. See *United States ex rel. Chapman* v. *Federal Power Commission*, 191 F. 2d 796 (C. A. 4). Accordingly, it does not follow that, in a suit against the agency as an entity, the law as to venue and jurisdiction governing suits against the United States *eo nomine* is applicable. That it is not necessarily applicable is shown by the differences between Rules 4 (d) (4) and 4 (d) (5) of the Federal Rules of Civil Procedure. The former relates to service "upon the United States" and the latter to service "upon an officer or agency of the United States." *Infra*, pp. 79–80.

to accept service of process. Cf. *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225 (D. Mass.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405 (W. D. N. Y.); *Regina Cargo Airlines, Inc.* v. *Civil Aeronautics Board*, 10 F. R. D. 628 (E. D. N. Y.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.). In the present case, there is no such authorization and petitioner points to none.[28]

Because of these provisions in the Federal Rules of Civil Procedure and the traditional ter-

[28] Petitioner suggests, in this connection, that, under Rule 4 (d) (5) service on an agency which is a corporation may be made under Rule 4 (d) (3), which provides for service upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *." But, clearly, the Civil Service Commission is not a corporate agency of the United States (see 5 U. S. C. 632). The case of *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4), upon which petitioner relies (Pet., pp. 11–13), is inapposite, therefore, since the court there regarded the Federal Housing Administration as a corporation and pointed out that this Court had listed it as a federal corporation in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 390, fn. 3. Unlike the Federal Housing Administration, the Civil Service Commission is not engaged in commercial activity. Cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245.

ritorial limitations upon the exercise of *in personam* jurisdiction, it is clear that the only court which would have jurisdiction *in personam* over the Civil Service Commission is the District Court for the District of Columbia. The courts have uniformly so held in suits against other public officials whose official residence is in the District of Columbia. *Smart* v. *Woods*, 184 F. 2d 714 (C. A. 6), certiorari denied, 340 U. S. 936; *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4); *Love* v. *Royall*, 179 F. 2d 5 (C. A. 8); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3), *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4) certiorari denied, 339 U. S. 949; *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793 (C. A. 5); *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908; *Mecartney* v. *Hoover*, 151 F. 2d 694 (C. A. 7); *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. A. 5); *Howard* v. *United States ex rel. Alexander*, 126 F. 2d 667 (C. A. 10), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Jewel Productions, Inc.* v. *Morgenthau*, 100 F. 2d 396 (C. A. 2); *Abe Rafelson Co.* v. *Tugwell*, 79 F. 2d 653 (C. A. 7); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Transcontinental & Western Air, Inc.* v.

Farley, 71 F. 2d 288 (C. A. 2), certiorari denied, 293 U. S. 603; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).[20]

We submit, therefore, that, not only was venue improperly laid in the district court below, but the court also lacked jurisdiction *in personam*—even on the assumption that section 10 of the Administrative Procedure Act does make a difference as to the court's jurisdiction over the subject matter, *i. e.*, a suit by a federal employee for job restoration.

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[20] To the same effect see *Juell* v. *Commissioner of Immigration and Naturalization*, 37 F. Supp. 533 (E. D. N. Y.), modified on other grounds 121 F. 2d 728 (C. A. 2); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4); *Kentucky Natural Gas Corp.* v. *Public Service Commission of Kentucky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6); *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *New Amsterdam Cas. Co.* v. *United States*, 71 F. Supp. 155 (W. D. Pa.); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.); *Tribal Council of Blackfeet Indian Reservation, Mont.* v. *Ickes*, 58 F. Supp. 584 (D. Mont.); *Totus* v. *United States*, 39 F. Supp. 7 (E. D. Wash.); *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Carr* v. *Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405 (W. D. N. Y.); *Eng Kam* v. *McGrath*, 10 F. R. D. 135 (W. D. Wash.); *Regina Cargo Airlines, Inc.* v. *Civil Aeronautics Board*, 10 F. R. D. 628 (E. D. N. Y.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.).

II

IF THIS IS A SUIT AGAINST THE RESPONDENTS AS INDIVIDUAL OFFICERS, IT LIKEWISE CANNOT BE MAINTAINED IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

The second string to petitioner's bow appears to be that, entirely aside from the Administrative Procedure Act, he is entitled to proceed in the Louisiana District Court against the respondents as individual officers acting in excess of their statutory authority, just as he could proceed in the District of Columbia. This argument, too, is clearly unmeritorious. The suit cannot be maintained in the Louisiana District Court because (A) the Civil Service Commissioners who are indispensable parties cannot be sued in that venue and the court does not have, and cannot obtain, personal jurisdiction over them, and (B) in any event, the Louisiana court cannot grant the only relief requested against the individual respondents, *i. e.*, a declaration that he is entitled to restoration or an actual order of restoration.

A. THE CIVIL SERVICE COMMISSIONERS WHO ARE INDISPENSABLE PARTIES CANNOT BE SUED IN THE DISTRICT COURT

Our argument on this point is substantially the same as we have made in Point I, *supra*, pp. 38–53.

1. *Indispensable parties.*—For the same reasons discussed above on the assumption that the action was brought against the Commission as a

Government agency, the Civil Service Commissioners are indispensable parties on the assumption that the suit runs against them as individual officers. *Supra*, pp. 38–41. The restoratory relief sought would require the Commissioners to direct respondent Guerre to restore petitioner to his prior position (R. 15), and petitioner could not be so restored without action by the Commissioners. Their concurrence is necessary. Under *Williams* v. *Fanning*, 332 U. S. 490, 493, 494, and earlier cases, they are indispensable parties.

2. *Venue.*—As shown above (pp. 41–44), 28 U. S. C. 1391 (b)—which prescribes that "A civil action wherein jurisdiction is not founded solely on diversity of citizenship" may "be brought only in the judicial district where all defendants reside, except as otherwise provided by law"—requires that an action against the Commissioners be brought in the District of Columbia. This is the official residence of the Commissioners as well as of the Commission as an agency. *Supra*, pp. 42–44.

3. *Jurisdiction in personam.*—Personal service was not and could not be made on the Commissioners. All that petitioner did was to send the summons and complaint by registered mail to Washington, and serve a copy on the Regional Director of the Tenth Civil Service Region in New Orleans (R. 2, 3). For the reasons and on the authorities given above (pp. 47–53), this is not sufficient under the Federal Rules of Civil Pro-

cedure. If the applicable provision is Rule 4 (d) (5) (*infra*, pp. 79–80), governing service on "an officer or agency of the United States," then proper service requires personal delivery to the "officer[s]" (*i. e.*, the Commissioners), and it is not enough to serve by mail or to deliver a copy of the summons and complaint to a subordinate not authorized to accept service. If the proper provision is Rule 4 (d) (1) (*infra*, p. 78–79, concerning service "Upon an individual other than an infant or an incompetent person," service can be made only by physical delivery to the defendant personally, "or by leaving copies thereof at his dwelling house * * * with some person of suitable age * * * then residing therein," "or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." There is nothing in this record or the pertinent statutes and regulations which provides that a Regional Director of the Commission is authorized to receive process on behalf of the Commissioners in actions such as the present one. Cf. *Mecartney* v. *Hoover*, 151 F. 2d 694 (C. A. 7); *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).

Whichever Rule is applicable here, it is plain that proper personal service was not effected on the Commissioners as individual officers alleged to have exceeded their statutory authority.

B. THE DISTRICT COURT LACKS JURISDICTION TO GRANT THE DECLARATORY RELIEF REQUESTED BY PETITIONER

In any event, assuming that the District Court below has *in personam* jurisdiction over the Commissioners and that venue was properly laid, we submit that that court lacks jurisdiction to grant petitioner the relief requested against the respondents. That relief is, primarily, a declaratory judgment that petitioner is entitled to reinstatement to his position and to the pay he has lost by reason of his discharge.

In providing for a judicial determination of rights by a Federal court in "a case of actual controversy within its jurisdiction," the Declaratory Judgment Act (28 U. S. C. 2201) manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to proceed under that Act, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.*, 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell*, 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound discretion of the court, which should be exercised only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered"

(*American Federation of Labor* v. *McAdory*, 325 U. S. 450, 462). And especially where governmental action is involved this discretion must be cautiously exercised in the public interest. See *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431, 434.

Further, nothing in the Declaratory Judgment Act or in its legislative history suggests that the Act was intended to make reviewable administrative action which for reasons of statute or policy was not previously reviewable. Thus, administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act. *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power and Light Co.*, 330 U. S. 802.

The Declaratory Judgment Act simply provided a new and additional remedy in situations where the courts could already grant relief. As this Court recently stated in *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671-2:

> "The operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds

> of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. * * * But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

It follows, therefore, that the Declaratory Judgment Act is applicable herein only in so far as the Louisiana District Court would otherwise have jurisdiction of the subject matter.[30]

In Point I, A, *supra*, pp. 18–21, we reviewed the well settled principles of law concerning the power of the courts to interfere with the tenure, selection, and removal of public officials and employees. We there pointed out that the judiciary possesses no general supervisory power over such issues and that the question of the sufficiency of the reasons for discharge of a federal officer or employee is not justiciable. We noted, however, that the courts have intervened to provide judicial relief where the discharge was contested on the ground that compliance was not had with the procedural steps required by statute or regulation. In such circumstances, money judgments have been entered against the United States in the Court of Claims, and appropriate relief has been afforded against the offending executive officer in the District Court

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[30] See also *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; Borchard, *Declaratory Judgments* (2d ed. 1941), pp. 232–234.

for the District of Columbia. Accordingly, whether petitioner may here obtain declaratory relief depends upon whether the District Court below has the same jurisdiction possessed by the Court of Claims and the District Court for the District of Columbia.

With respect to that part of petitioner's prayer for relief which asks for a declaration that petitioner is entitled to a money judgment for his salary, we have already shown in Point I, B, *supra*, pp. 21–23, that the district courts do not have jurisdiction, under 28 U. S. C. 1346 (d) (2), of the subject matter of such suits. It follows that the district courts lack jurisdiction to give declaratory relief in lieu of money judgments, and it has so been held. *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C. A. D. C.), certiorari denied, 326 U. S. 686; *Almour* v. *Pace*, Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); *Love* v. *United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673; cf. *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Yeskel* v. *United States*, 31 F. Supp. 956 (D. N. J.); see also *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra* at 689, fn. 9.

Similarly, the district courts other than the District Court for the District of Columbia do not have jurisdiction to enforce compliance with procedural requirements relating to removal from the Government service. Putting the Declaratory Judgment Act to one side, we think it clear that,

after the employee has been discharged, a district court could compel such compliance only by an action in the nature of a writ of mandamus. Cf. *Kendall* v. *United States ex rel Stokes*, 12 Pet. 524, 613–614; see also *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622. It has long been settled, however, that the district courts other than the District Court for the District of Columbia have no general original jurisdiction to issue the writ of mandamus. As early as *McIntire* v. *Wood*, 7 Cr. 504, this Court held that the jurisdiction of an inferior federal court to issue the writ of mandamus was confined exclusively to cases in which the writ was necessary to the exercise of their existing jurisdiction—as auxiliary to the enforcement of an order, judgment, or decree in a pending action. This ruling was reiterated in subsequent cases. *McClung* v. *Silliman*, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427; *Davenport* v. *County of Dodge*, 105 U. S. 237; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109.

Further, this Court has rejected the once ingenious thought that lack of jurisdiction to issue a writ of mandamus can be supplied by converting the proceeding into an equitable action for a mandatory injunction. *Smith* v. *Bourbon County*, 127 U. S. 105, 112; see *Miguel* v. *McCarl*, 291 U. S. 442, 452; *White* v. *Berry*, 171 U. S. 366;

Warner Valley Stock Co. v. *Smith*, 165 U. S. 28; *Gaines* v. *Thompson*, 7 Wall. 347. Accordingly, although Rule 81 (b) of the Federal Rules of Civil Procedure has abolished the writ of mandamus and provided that relief thereby formerly available may now be obtained by appropriate action under the rules, it has uniformly been held that substantive rights are still governed by the principles formerly applied in mandamus cases. *Marshall* v. *Crotty*, 185 F. 2d 622 (C. A. 1); *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C. A. 9), certiorari denied, 333 U. S. 842; *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2); *Youngblood* v. *United States*, 141 F. 2d 912 (C. A. 6); *Branham* v. *Langley*, 139 F. 2d 115 (C. A. 4).[31]

It would appear, therefore, that, unless the writ of mandamus is merely a remedy rather than a proceeding which in itself confers jurisdiction on the courts, district courts other than the District Court for the District of Columbia would not have jurisdiction to enter a declaratory judgment in this type of case.

As we read the opinions of this Court, a proceeding in the nature of a writ of mandamus

[31] See also to the same effect *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Breiner* v. *Kniskern*, 90 F. Supp. 9 (E. D. Pa.); *McGrimley* v. *Foley*, 89 F. Supp. 10 (D. Mass.), affirmed, 180 F. 2d 1022 (C. A. 1); *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.); *Kohlman* v. *Smith*, 71 F. Supp. 73 (W. D. Pa.).

is clearly more than a mere remedy employed in aid of jurisdiction otherwise possessed. Thus, this Court long ago rejected the argument that a writ of mandamus could issue if the district court acquired jurisdiction by reason of diversity of citizenship, the raising of a federal question, or by removal from the state courts. *McClung* v. *Silliman*, 6 Wheat. 598; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Rosenbaum* v. *Bauer*, 120 U. S. 450. The opinion in *McClung* v. *Silliman, supra*, is particularly revealing on this point. There, the argument was made that the district court [then the circuit court] had jurisdiction under Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78, because of diversity of citizenship, and that the writ could be issued as auxiliary to the exercise of its jurisdiction. The Court observed that (6 Wheat. at 601):

> It is now contended, that as the parties to this controversy are competent to sue, under the 11th section, being citizens of different states, that this is a case within the provisions of the 14th section, and the circuit court was vested with power to issue this writ, under the description of a "writ not specially provided for by statute," but "necessary for the exercise of its jurisdiction." The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect. *It cannot be denied,*

that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue. [Emphasis added.]

In accord with the reasoning of these cases, it has been held since the enactment of the Declaratory Judgment Act that, even though the court possessed the power to issue the writ in appropriate cases, the court could not grant a declaratory judgment if the circumstances of the case rendered the writ inapplicable. *Doehler Metal Furniture Co. Inc.* v. *Warren*, 129 F. 2d 43 (C. A. D. C.), certiorari denied, 317 U. S. 663, rehearing denied, 317 U. S. 708. In that case, a dispute arose as to the extent of the liability owed by the plaintiff to the Government on a Government contract. The contract provided that if the plaintiff failed to make deliveries by specified times, the Government could terminate plaintiff's right to proceed, make substitute purchases, and hold plaintiff liable for the excess cost occasioned the Government. The Government eventually did cancel the contract and purchased additional supplies elsewhere which would have cost it $82,607.77 under the contract. The Comptroller Gen-

eral in his settlement of the claim determined that the actual cost to the Government was $104,290.19. Plaintiff contended, however, that the actual cost to the Government was $94,881.57, and brought suit in the District of Columbia against the Comptroller General for a declaration of his rights.

The Court of Appeals noted first that the dispute involved only a question of fact. It was not alleged that there was no basis for the determination of the Comptroller General, that there was no room for judgment or discretion, or that the use of plaintiff's figure was a ministerial duty. Thus, the court was "being asked to disturb what is, in essence, a finding of fact, or an exercise of discretion." (129 F. 2d at 44.) The court then observed that (*id.* at 45);

> As has been indicated, there is, ordinarily, no judicial scrutiny of the General Accounting Office. The judiciary has confined its control over the Comptroller General, so far as we know, to writs of mandamus and mandatory injunctions, and such judicial compulsion is not a common occurrence.
>
> It is clear that this complaint would not support a prayer for a writ of mandamus. Plaintiff carefully states that it wants no such action. Nonetheless it argues that the Comptroller General is suable in the District Court under the declaratory judgment Act.

Continuing, the court stated that (*id.* at 45):

> The declaratory judgment is basically a type of relief which it is hoped will further the ever present struggle of making justice more just. It is an added number in a court's repertoire from which to choose the appropriate help for a party. Likewise, the existence of another adequate remedy does not foreclose the use of a declaratory judgment where it is otherwise appropriate. The declaratory judgment Act, however, does not increase the jurisdiction of the federal courts, in the sense that, if a court has not had power over certain subject matter or over certain persons, the declaratory judgment Statute does not give it.

And, pointing out that (*id.* at 45):

> * * * the only jurisdiction the District Court has ever had over the actions of the Comptroller General is that of mandamus. Mandamus is one of the extraordinary writs. It in itself is a special remedy. That a court has jurisdiction in certain extreme situations does not mean that it has a generic supervisory and appellate jurisdiction.

the court concluded that (*id.* at 45): "the power to issue writs of mandamus does not give a court such general jurisdiction over the agency or subject matter as to enable it to choose another form of relief, the declaratory judgment, for cases in which the writ of mandamus itself could not be issued." *Accord: United States ex rel. Jordan* v.

Ickes, 143 F. 2d 152 (C. A. D. C.), certiorari denied, 320 U. S. 801.[22]

In the instant case, as in that case, the courts have no generic supervisory and appellate jurisdiction over the discharge of federal employees (see *supra*, pp. 18–21). The only jurisdiction a court might exercise to compel an executive officer to comply with procedural requirements laid down by statute or regulation in effectuating the removal of a Government employee is, after the employee has already been discharged, in the nature of a writ of mandamus. Accordingly, if, as we believe, the *Doehler Metal Furniture Co.* case, *supra*, pp. 64–66, correctly states the relationship between mandamus and declaratory judgment, it is a necessary conclusion that the Louisiana district court cannot enter a declaratory judgment because it has no general original jurisdiction in the nature of a writ of mandamus.[23]

[22] In *Putnam* v. *Ickes*, 78 F. 2d 223, 226, certiorari denied, 296 U. S. 612, the Court of Appeals for the District of Columbia said: "We think it is clear from any reasonable construction of the acts that the Declaratory Judgment Act has not given the courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought."

[23] In this connection, it is pertinent to observe that, in our view, this Court's decisions in *McGrath* v. *Kristensen*, 340 U. S. 162, and *Perkins* v. *Elg*, 307 U. S. 325, support the argument here advanced. Basic to the Court's ruling in those cases that a declaratory judgment could be entered by the District Court for the District of Columbia was the fact that the cases were appropriate ones for the issuance of a writ of mandamus—that the decree sought would not interfere with the exercise of executive discretion (340 U. S. at 169–171).

The lower courts have so held in cases similar to the one at bar. In *Marshall* v. *Crotty*, 185 F. 2d 622, the First Circuit recently held "that a district court lacking jurisdiction [to give a declaratory judgment] by way of mandamus, is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights of a former U. S. government employee" (p. 628). District courts have ruled the same way. *E. g.*, *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.); *Breiner* v. *Kniskern*, 90 F. Supp. 9 (E. D. Pa.); *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Kohlman* v. *Smith*, 71 F. Supp. 73, 76 (W. D. Pa.). See also *Hopkins* v. *Wallin*, 179 F. 2d 136, 137 (C. A. 3).[34]

We have shown in Point I, C, *supra*, pp. 26–37, that nothing in Section 10 of the Administrative Procedure Act, including subsection (b),[35] was

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[34] The District Court for the District of Columbia would, of course, have jurisdiction to enter a declaratory judgment in such a case since it has the power to issue a writ of mandamus. Cf. *Borak* v. *Biddle*, 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738.

[35] Section 10 (b) provides:

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

designed to alter this long-existing rule that the district courts other than the District of Columbia court have no jurisdiction to issue writs of mandamus or mandatory injunctions in cases such as this. For the same reasons, we think it clear that the Act did not empower these courts to issue declaratory judgments instead of mandamus. They are not "courts of competent jurisdiction" with respect to this type of proceeding. This Court has previously held that provisions of the Judicial Code which conferred jurisdiction upon the district courts in cases involving diversity of citizenship, a Federal question, and removal from State courts, did not grant them general jurisdiction in the nature of mandamus (*supra*, pp. 63–64). There is even less reason to believe that Congress intended to depart from its established policy when it passed the Administrative Procedure Act.

III

RESPONDENTS DID NOT WAIVE THEIR DEFENSES OF IMPROPER VENUE, LACK OF JURISDICTION *IN PERSONAM*, AND WANT OF JURISDICTION TO GRANT THE RELIEF REQUESTED

Petitioner further argues that, even if venue was improperly laid in the District Court below and that court lacked jurisdiction over the persons of the Civil Service Commissioners, those defenses were waived by respondents. This contention, we submit, is groundless.

The record plainly shows that respondents raised the defenses of improper venue and want of jurisdiction at every possible stage. Prior to the filing of an answer, respondents moved to dismiss the complaint because of improper venue and lack of jurisdiction (R. 3). After this defense was denied, respondents filed an answer which re-urged those defenses in two ways. In particular, the answer denied that A. J. Leach, Regional Director, Tenth Civil Service Region, represents the Commission for the service of process so as to bring the Commission or its members within the jurisdiction of the court (R. 17–18). And by way of separate defense, the answer specifically reasserted respondents' objections to venue and jurisdiction (R. 17, 19–20). Finally, after petitioner moved for summary judgment, respondents filed a counter-motion for summary judgment, together with a motion which again presented the defenses of improper venue and lack of jurisdiction (R. 4).

Certainly, as a factual matter, it cannot be said that respondents intended to waive those defenses. Nor did they waive them as a matter of law.

Rule 12 (b) of the Rules of Civil Procedure expressly provides that objections to venue or jurisdiction may be made by answer or by motion. Here, it was done by both. In these circumstances, it is clear that, having made its objec-

tions to venue or jurisdiction by motion, a defendant does not waive his defenses by answering on the merits or by going on to a trial on the merits if the defenses are denied. Cf. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525, and cases there cited; *Gaines* v. *Gaines*, 157 F. 2d 521 (C. A. D. C.); *Orange Theater Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871 (C. A. 3), certiorari denied, 322 U. S. 740; *Blank* v. *Bitker*, 135 F. 2d 962 (C. A. 7); *Vilter Mfg. Co.* v. *Rolaff*, 110 F. 2d 491 (C. A. 8); *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941 (D. Mass.); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.).[20]

Petitioner urges, however, in reliance on *Merchant Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U. S. 286, that respondents waived these defenses by affirmatively asking for a summary judgment. The contention is that "lack of jurisdiction of the person is waived by seeking relief similar to that requested by the other party." (Pet. p. 16). That assertion results from an over-broad reading of the ruling in the *Merchant Heat & Light Co.* case, *supra*. In that case, the

[20] Accordingly, it is legally irrelevant that, after respondents raised its objections to venue and jurisdiction by motion on June 1, 1948 (R. 3), and by answer on August 2, 1949 (R. 3), respondents, pursuant to an order of the court dated August 11, 1949 (R. 3), filed a record of the administrative proceedings had in this case (R. 3–4).

defendant moved to quash the return of service, and, after it was overruled, pleaded the general issue and also a recoupment or set-off of damages in excess of the amount ultimately found due to the plaintiff (204 U. S. at 289). The Court assumed, first, that "the defendant lost no rights by pleading to the merits, as required, after saving its rights" (*id.* at 289), but observed that the defendant "by setting up its counterclaim * * * became a plaintiff in its turn, invoking the jurisdiction of the court in the same action and by invoking submitted to it." (*Id.* at 289). The Court pointed out (*id.* at 289–290) that the defendant, if he elected to sue upon his affirmative claim in the same action, assumed "the position of the actor and must take the consequences"; especially since he was wholly free to interpose his claim or to bring a separate suit. The case stands only for the proposition that a defendant cannot be permitted to invoke the jurisdiction of the court for affirmative relief and deny it afterwards. Cf. *Texas & Pac. Ry. Co.* v. *Eastin & Knox*, 214 U. S. 153, 159–160.

In the instant case, however, respondents did not ask for affirmative relief. Respondents' motion for a summary judgment was not, as in the *Merchant Heat & Light Co.* case, *supra*, in effect the institution of a cause of action against petitioner, but merely the equivalent of a motion to

dismiss on the ground that petitioner does not state a cause of action." Moreover, the motion for a summary judgment was made in the alternative with the motion to dismiss for improper venue and lack of jurisdiction, and it is the latter motion that the district court acted upon (R. 23). Accordingly, respondents did not become plaintiffs in the action and did not themselves invoke the jurisdiction of the court. The court below correctly decided that there had been no waiver.[37]

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[37] Compare Rule 12 (b) of the Federal Rules of Civil Procedure which states that "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * *." Similarly, in such circumstances, Rule 12 (c) provides that a motion for judgment on the pleadings shall be treated as a motion for summary judgment.

[38] In any event, there can be no doubt that the question of whether the District Court below lacked jurisdiction to give the declaratory relief requested by petitioner is still open. Rule 12 (h) of the Federal Rules of Civil Procedure expressly provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." In this connection, it may be noted that respondents' motion to dismiss contended "that the plaintiff seeks orders of a mandatory nature which the United States District Courts outside of the District of Columbia have no jurisdiction to grant," and that respondents so urged in their briefs in the courts below.

IV

THE CHANGE OF VENUE PROVISION OF 28 U. S. C. 1406 (a) IS INAPPLICABLE

Lastly, petitioner contends that, if venue was improperly laid in the District Court below, the court erred in not transferring the case to the District Court for the District of Columbia, pursuant to 28 U. S. C. 1406 (a), which states that:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

" At the time this suit was brought, Section 1406 (a) provided that the court "shall" transfer such case to any district or division in which it could have been brought. As amended on May 24, 1949 (63 Stat. 101), Section 1406 (a) now vests discretion in the court to make the transfer "if it be in the interest of justice." Although the original form of Section 1406 (a) apparently made such transfer mandatory, the legislative history of the 1949 amendment reveals that Congress did not so intend. Thus, the House Committee on the Judiciary stated: "This section removes an ambiguity in section 1406 (a) of title 28, U. S. C., by substituting 'may' for 'shall', thus making it clear that the court may decline to transfer a case brought in the wrong district under circumstances where it would not be in the interest of justice to make such transfer." H. Rept. No. 352, 81st Cong., 1st Sess., p. 14; see also S. Rept. No. 303, 81st Cong., 1st Sess., p. 4. In any event, since the amended version was in force at the time respondents' first motion was denied on June 13, 1949, that language and not the original form of Section 1406 (a) is herein applicable. Cf. *Untersinger* v. *United States*, 87 F. Supp. 532 (S. D. N. Y.), affirmed, 181 F. 2d 953 (C. A. 2); *Orr* v. *United States*, 174 F. 2d 577, 580 (C. A. 2).

Petitioner asserts that respondent Guerre is not an indispensable party to the action, and that the action could, therefore, have been brought originally in the District of Columbia (Pet. pp. 9–10).

We think it unnecessary for this Court to decide the question thus posed by petitioner. Even assuming that respondent Guerre is not an indispensable party, the decision of the court below denying transfer is correct on another ground.* It is hornbook law that transitory actions, such as the present one, must begin with proper service upon the defendant, and that, when they do not, the judgment is a nullity. *Pennoyer* v. *Neff*, 95 U. S. 714. Necessarily, therefore, the change of venue provision of 28 U. S. C. 1406 (a) must be predicated on the supposition that the transferring court has jurisdiction over the person of the defendant. If it does not have that jurisdiction, clearly it does not possess the power to confer that *in personam* jurisdiction upon another court. In an analogous situation, this Court pointed out that "In all cases in which the doc-

*Since the action was dismissed without prejudice, petitioner can, of course, institute a new action in the District of Columbia. If the employing agency be deemed an indispensable party, petitioner can obtain jurisdiction over the Veterans Administration by naming the Veterans Administrator a party defendant instead of respondent Guerre, the Regional Manager of the Veterans Administration, who has no independent statutory authority but is delegated authority by the Veterans Administrator.

trine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506–507. And, after the enactment of the doctrine of *forum non conveniens* into federal law in 28 U. S. C. 1404 (a), the Court again noted that "§ 1404 (a) of the Code deals with the right to transfer an action properly brought." *Ex parte Collett*, 337 U. S. 55, 60.[41] These observations by the Court, with respect to Section 1404 (a), are, we believe, equally pertinent as to Section 1406 (a).

Since, as we have shown above, pp. 47–53, 55–56, the District Court lacked jurisdiction *in personam* because of improper service, and since timely objection was made thereto, *supra*, pp. 69–73, we submit that Section 1406 (a) has no application here.[42]

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[41] See also, to the same effect, *Shapiro* v. *Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (C. A. 9); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2).

[42] If Section 1406 (a) were applicable, the case could not be transferred to the District Court for the District of Columbia without eliminating from the case petitioner's prayer for a declaration that he is entitled to the pay he has lost by reason of his separation. As the suit now stands, it could not have been brought originally in the District Court for the District of Columbia since that court also has no jurisdiction in this respect, under 28 U. S. C. 1346 (d) (2). Cf. *Shapiro* v. *Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (C. A. 9); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

JANUARY 1952.

APPENDIX

1. The pertinent sections of Title 28, United States Code are as follows:

> § 1346 (d) The district courts shall not have jurisdiction under this section of:
>
> * * * * *
>
> (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States. [As amended, P. L. 248, 82d Cong., 1st Sess.]
>
> § 1391 (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> § 1406 (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

2. The pertinent Federal Rules of Civil Procedure are as follows:

> 4 (d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the com-

plaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

* * * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United

States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

* * * * *

4 (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

* * * * *

12 (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading,

he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * * * *

12 (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

3. Section 10 of the Administrative Procedure Act (Act of June 11, 1946, 5 U. S. C. 1009) provides, in pertinent part, as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION. The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS. Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

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No. 361

In the Supreme Court of the United States

OCTOBER TERM, 1951

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUESSER, MANAGER, VETERANS' ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

This memorandum is submitted in response to the request of Mr. Justice Frankfurter at the close of oral argument for further discussion of the effect upon the suability of the United States Civil Service Commission of Section 12 (c) of the Hatch (Political Activities) Act of 1939, as added by the Act of July 19, 1940, 54 Stat. 767, 5 U. S. C. (Supp. IV) 118k (c).

It is the position of the respondents that Section 12 (c) of that Act makes the Civil Service Commission a suable entity solely for the pur-

poses of judicial review of determinations made by the Commission under Section 12 (b) of that Act, and that the Commission is not otherwise suable as an entity. That the scope of Section 12 (c) is thus limited is apparent both from the internal structure of the Act as a whole and from the legislative history of Section 12 (c).

In its original form, the Hatch Act provided in Section 9 (a) that "It shall be unlawful for any person employed in the executive branch of the Federal Government * * *, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. * * * [and to] take any active part in political management or in political campaigns" (53 Stat. 1148 (5 U. S. C. Supp. IV) 118i (a)). And Section 9 (b) declared that "Any person violating the provisions of this section shall be removed immediately from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person" (53 Stat. 1148, 5 U. S. C. (Supp. IV) 118i (b)). By the Act of July 19, 1940, 54 Stat. 767, Congress added Section 15 to the Hatch Act, which expanded the prohibitions on political activities of federal employees (5 U. S. C. (Supp. IV) 118*l*):

> The provisions of this act which prohibit persons to whom such provisions apply from taking any active part in political

> management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 78–79.

As thus enacted, there was no specific designation of a single government agency for the enforcement of Section 9. However, as this Court noted in *United Public Workers* v. *Mitchell*, *supra*, at 79–80:

> For many years before the Hatch Act the Congress had authorized the exclusion of federal employees in competitive classified service from active participation in political management and political campaigns. In June 1938, the congressional authorization for exclusion had been made more effective by a Civil Service Commission disciplinary rule. *That power to discipline members of the competitive classified civil service continues in the Commission under the Hatch Act by virtue of the present applicability of the Executive Order No. 8705, March 5, 1941.* [Emphasis supplied.]

Of importance here is the fact that Congress made no provision for judicial review of orders of the Commission enforcing the provisions of Section 9. See *United Public Workers* v. *Mitchell*, *supra*, at 93.

In contrast to the absence of any provision for judicial review of discharges of Federal employees under Section 9, Congress did provide for review of disciplinary action taken under Section 12, which was also added to the Hatch Act by the Act of July 19, 1940, *supra*, 5 U. S. C. (Supp. IV) 118k. Section 12 (a) extended the prohibitions of Section 9 to the officers or employees "of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" (5 U. S. C. (Supp. IV) 118k (a)). Section 12 (b) requires the Civil Service Commission, upon receipt of information which warrants an investigation, to determine at a hearing whether a violation of Section 12 (a) has taken place and, if so, whether the violation warrants the removal from office of the person by whom it was committed. If the Commission determines, after the hearing, that a violation of Section 12 (a) has occurred which warrants removal from office, notice of its determination is given to the employee and the appropriate State or local agency. If the employee is not removed within thirty days after notice of the Commission's determination, the

Commission is required to issue to the appropriate Federal agency an order requiring that agency to withhold from its grants to the State double the amount of the annual compensation of the offending officer or employee (5 U. S. C. (Supp. IV) 118k (b)). Section 12 (c) permits "Any party aggrieved by any determination or order of the Commission" to institute review proceedings, within thirty days after the mailing of the Commission's notice, in the Federal district court for the district in which the offending officer or employee resides. "A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the determination or the order complained of was made" (5 U. S. C. (Supp. IV) 118k (c)).

In short, Congress drew an express distinction between the rights of Federal employees and State employees with respect to judicial review. Specific provision was made for suits against the Commission in cases of alleged violations of Section 12 by State employees; no provision was made for review in cases of alleged violation of Section 9 by Federal employees. We think it not without significance, in this connection, that the actions which have heretofore been brought to test the constitutionality of Sections 9 and 12 of the Hatch Act have conformed to this distinction in their designations

of parties defendant. Thus, the validity of Section 9 was attacked in a suit against the Commissioners themselves (*United Public Workers* v. *Mitchell, supra*), whereas the validity of Section 12 was challenged in a suit against the Commission (*Oklahoma* v. *Civil Service Commission*, 330 U. S. 127).[1] In view of this dichotomy within the Hatch Act itself with respect to the suability of the Civil Service Commission, that Act certainly provides no support for the suggestion that Congress thereby made the Commission a suable entity for all purposes.

That Congress did not intend to make the Commission generally suable is also demonstrated conclusively by the legislative history of Section 12. As previously noted, Section 12 was added by the Act of July 19, 1940, *supra*. The bill contained no provision for judicial review when introduced, although it did include a provision permitting a State to participate in the administrative proceeding. 86 Cong. Rec. 2344.[2] An amendment was offered by Senator Danaher permitting an "appeal" to a federal district court by a State "officer or employee, or the appropriate State or local agency, or both * * *," in accordance with the procedure established by the Chandler

[1] The *Mitchell* suit was instituted in the District Court for the District of Columbia, the Oklahoma suit in the District Court for the Northern District of Oklahoma.

[2] S. 3046, 76th Cong., 3d sess., reported to the Senate by the Committee on Privileges and Elections on February 26, 1940, 86 Cong. Rec. 1944.

Act (11 U. S. C. 67 (c)), 86 Cong. Rec. 2429. This amendment, which eventually became Section 12 (c) of the Act, was vigorously opposed on the ground that it would be inequitable to afford a right of judicial review to a State or local employee when no such right was available under existing law to federal employees who are discharged for cause. 86 Cong. Rec. 2429–2430, 2648–2472; see also 86 Cong. Rec. 9448.

The following colloquy between Senators Norris and Danaher is particularly revealing on this score (86 Cong. Rec. 2429–2430):

> Mr. NORRIS. * * * Does not the Senator see that such employees are akin to the employees in any of the Federal departments? Suppose some one in the War Department should violate a rule, or for any other reason should be discharged by his superior officer; should we not give to him the blessed right of appeal and let him go to the Supreme Court, and provide that in the meantime the War Department must permit him to continue to draw his salary? It seems to me that if we should apply the same theory to everything that is akin to this situation we should have more cases in the Supreme Court than a dozen Supreme Courts could take care of.
>
> Mr. DANAHER. Has the Senator concluded?
>
> Mr. NORRIS. Yes.
>
> Mr. DANAHER. Let me answer the Senator in this way: It seems to me that the

fact that at present there is no machinery for appeal under the civil service is a very serious defect, and those of us who are interested in civil service have long regretted it. Under Federal law there is no right of appeal today for a civil servant who is wrongfully dismissed. I am perfectly willing that such employees be given the machinery within the civil-service structure to take appeals. I am perfectly willing that amendatory legislation to that effect be achieved. However, I have not undertaken to make my amendment applicable to all civil-service legislation.

Mr. NORRIS. Why not?

Mr. DANAHER. We are working on a particular bill.

Mr. NORRIS. Why not make the amendment applicable to all civil-service legislation?

Mr. DANAHER. I am willing that that be done.

Mr. NORRIS. Let us do that, and kill the bill.

Mr. DANAHER. We are working on a particular bill. We are not working on the Civil Service Act of 1882. Consequently, when we take this step, if it be a good precedent, if it affords a sound basis for appeal, and if it looks to the protection of the injured employee or officer who is removed from the rolls, it will do exactly what some of us, I am sure, want to see done in the interest of justice to the accused. * * *

In the light of this legislative history, there can be no doubt that the Hatch Act did not purport to make the Civil Service Commission suable as a juridical entity in cases such as the one at bar.

In authorizing the Commission to be sued as a juridical entity in certain Hatch Act cases, Congress did no more than to designate the Commission as a statutory defendant to stand in judgment on behalf of the United States so that a decree against it would bind the Government for the limited purposes of review of action taken under Section 12 of the Hatch Act. Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 27. Congress has similarly provided, in other special cases, for consented suits against the United States to be brought against other agencies of the United States as nominal defendants. *E. g.*, Section 204 of the Packers and Stockyards Act, 7 U. S. C. 194 (Sec'y of Agriculture); Section 6 (a) of the Commodity Exchange Act, 7 U. S. C. 8 (Sec'y of Agriculture, Sec'y of Commerce, and Atty. General); Section 9 (a) of the Trading With the Enemy Act, 50 U. S. C. App. 9 (a) (Atty. General, as successor to Alien Property Custodian); Section 503 of the Nationality Act of 1940, 8 U. S. C. 903 (Sec'y of State, and others); Section 3 of the Bridge Act of 1935, 33 U. S. C. 505 (Sec'y of War). Yet, it has never been supposed that such limited waivers of sovereign immunity for particular purposes were

general waivers for all purposes. Thus, although the Department of Agriculture is suable in the name of the Secretary of Agriculture under the Packers and Stockyards Act, it is well-settled that the Department of Agriculture is not otherwise a juridical entity which may be sued generally. *United States* v. *Remund*, 330 U. S. 539; *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793, 795 (C. A. 5); *Herren* v. *Farm Security Administration*, 153 F. 2d 76 (C. A. 8). To the same effect, see also, *e. g.*, *Love* v. *Royall*, 179 F. 2d 5, 7 (C. A. 8) (suit against Secretary of War and War Department); *Fay* v. *Miller*, 183 F 2d 986 (C. A. D. C.) (suit against United States Attorney); *Ann Arbor Township* v. *United States*, 93 F. Supp. 341, 343 (E. D. Mich.) (suit against Veterans' Administrator and Veterans' Administration)?

Because Congress has thus limited the instances in which the Civil Service Commission and other normally nonsuable agencies of the United States, such as the heads of the cabinet departments, may be sued, their amenability to suit depends upon an express statute and is quite different from that of the Government's corporate agencies. Unlike a corporate agency such as the Reconstruction Finance Corporation, the Civil Service Commission is not engaged in commercial activity, and the Act which created the Commission did not include a "sue-and-be-sued" clause (Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 632). Nor

did the Hatch Act, the Lloyd-LaFollette Act, or the Veterans' Preference Act include such a general clause.

The views as to amenability to suit expressed by this Court in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, are applicable to corporate agencies of the Government and are inapposite where noncorporate agencies are concerned. The question there was whether a regional agricultural credit corporation chartered by the R. F. C. pursuant to Congressional authorization was immune from suit in the absence of an express waiver of immunity. In resolving that question, the Court approached the problem by pointing out that (*id.* at 389):

> * * * It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing *corporations* for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit. [Emphasis supplied.]

The Court then observed that "In spawning these *corporations* during the past two decades, Con-

gress has uniformly included amenability to law. Congress has provided for not less than forty of such *corporations* discharging governmental functions, and without exception the authority to-sue-and-be-sued was included" (*id.* at 390). "Such a firm practice," the Court stated "reveals a definite attitude on the part of Congress which should be given hospitable scope" (*id.* at 390–391). Continuing, the Court pointed out that the parent corporation, the R. F. C., was authorized to "sue and be sued" and that "Congress naturally assured that the general *corporate* powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being." "Congress had a right to assume that the characteristic energies for *corporate* enterprise with which a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional." *Id.* at 393–394. The Court, therefore, concluded that (*id.* at 394):

> To give Regional an immunity denied to more than two score *corporations*, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from

making such an imputation of caprice. [Emphasis supplied throughout.]

These considerations, we submit, have no application to the present case. As noted above, the Civil Service Commission is not a corporate agency of the United States, is not engaged in commercial activity, and has not been endowed by Congress with the power to sue and be sued. There is no indication here of a Congressional climate of opinion that the Civil Service Commission should be generally amenable to suit. On the contrary, as shown above, the legislative history of Section 12 (c) of the Hatch Act demonstrates that Congress did not even intend to subject the Civil Service Commission to suit at the behest of Federal employees aggrieved by the Commission's action under that particular statute.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

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